Supreme Court, U.S.
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In The

Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under federal principles of claim preclusion and issue preclusion, is an unsecured creditor of a debtor in bankruptcy in privity with the Chapter 7 bankruptcy trustee?

2. When a bankruptcy trustee pursues litigation in the bankruptcy court against a defendant and the defendant prevails, may an unsecured creditor pursue litigation that arises from the same transaction in state court against the same defendant?

CORPORATE DISCLOSURE STATEMENT

The caption of this case contains the names of all parties.

Petitioner Dillard's, Inc. is a publicly held corporation. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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OPINIONS BELOW

Petitioner Dillard's, Inc. ("Dillard's") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Arizona in this case. The unpublished Memorandum Decision of the Court of Appeals is reproduced in Appendix A. (A-1.)[1] The unpublished minute entry of the Supreme Court of the State of Arizona denying Dillard's Petition for Review is reproduced in Appendix B. (A-18.) The unpublished Minute Entry of the Superior Court of Maricopa County, Arizona is reproduced in Appendix C. (A-20.) The opinion of the United States Court of Appeals for the Ninth Circuit in the matter giving rise to Dillard's claim of preclusion, published at 154 Fed. Appx. 4 (9th Cir. 2005), is reproduced in Appendix D. (A-22.)

JURISDICTION

The Arizona Court of Appeals' decision was entered on June 7, 2005, and the Arizona Supreme Court denied Dillard's timely petition for review on February 7, 2006. This Court has jurisdiction in this action pursuant to 28 U.S.C. § 1257(a). The preclusive effect of a judgment of a federal court is an issue of federal common law, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001); *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994), and a contention that a state court disregarded a federal judgment creates a controversy within this Court's jurisdiction, *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938).

[1] Pages of the Appendix are cited in the format "A-__."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 11, United States Code[2]

§ 323. Role and capacity of trustee.

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has the capacity to sue and be sued.

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§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . . .

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§ 704. Duties of trustee.

The trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is

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[2] Excerpts from and citations to the Bankruptcy Code in this Petition do not reflect amendments included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), which is not applicable in this case.

compatible with the best interests of parties in interest;

. . . .

STATEMENT OF THE CASE

Factual Background

Dillard's operates department stores in 29 states. Prior to 1999, Dillard's owned a subsidiary, Dillard's Ticketing Systems, Inc. ("DTS"), through which it sold to the public tickets to sports and entertainment events. Among the customers of DTS were Respondent AZPB Limited Partnership, which owns the Arizona Diamondbacks baseball franchise, and Respondent Phoenix Arena Development Limited Partnership, which operates the America West Arena in Phoenix. Respondents are referred to collectively as the "Diamondback Parties."

In 1999, Dillard's sold its stock in DTS to ETM Entertainment Network, Inc. ("ETM"). Dillard's, DTS, and ETM entered into a Transition Agreement, pursuant to which Dillard's agreed to provide services to DTS and ETM for a one-year period, after which ETM was to assume full responsibility for operating the ticketing business. Among other things, the Ticketing Agreement provided that Dillard's would collect revenues from sales of tickets to the public (which continued to be handled by Dillard's personnel during the transition period), forward those funds to ETM, and invoice ETM for the fees and charges due to Dillard's under the Transition Agreement. ETM paid Dillard's invoices for several months, but it did not pay invoices for services provided by Dillard's in March, April, and May 2000.

On June 22 and 23, 2000, Dillard's lawfully recouped the amount of its unpaid invoices, approximately $1.4 million, from the ticket revenue it then had on hand, approximately $2.9 million, and remitted the balance to ETM. Although the funds paid by Dillard's would have been sufficient to satisfy fully ETM's obligations to the Diamondback Parties, ETM apparently used the funds for other purposes.

The Bankruptcy Litigation

ETM and DTS filed petitions for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California in June 2000 and August 2000, respectively. James J. Joseph (the "Trustee") was appointed as trustee for both bankruptcy estates, and he filed an adversary proceeding in the Bankruptcy Court against Dillard's in April 2001. The Trustee sought to avoid and recover preferential transfers under 11 U.S.C. §§ 547 and 550; turnover of property of the bankruptcy estates under 11 U.S.C. § 542; damages for breach of the Transition Agreement and breach of an implied covenant of good faith and fair dealing; an accounting; and a declaratory judgment. All of the Trustee's claims for relief related to Dillard's recoupment of its unpaid fees in June 2000.

On June 26, 2002, the Bankruptcy Court granted Dillard's motion for summary judgment on all of the Trustee's claims and denied the Trustee's motion for partial summary judgment. The Bankruptcy Court's judgment was entered on June 28, 2002. The United States District Court for the Central District of California affirmed on February 21, 2003, and the United States

Court of Appeals for the Ninth Circuit affirmed the District Court on October 3, 2005. *In re ETM Entertainment Network, Inc.*, 154 Fed. Appx. 4 (9th Cir. 2005) (A-22).

The Arizona Litigation

In the meantime, the Diamondback Parties had commenced this litigation in the Superior Court of Maricopa County, Arizona. The Diamondback Parties sought damages for breach of contract, claiming to be third-party beneficiaries of the Transition Agreement; damages for conversion and unjust enrichment; and imposition of a constructive trust. As in the federal litigation, all of the Diamondback Parties' claims concerned Dillard's June 2000 lawful recoupment.

At the time that the Bankruptcy Court granted summary judgment to Dillard's in June 2002, Dillard's and the Diamondback Parties were pursuing cross-motions for summary judgment in the Arizona litigation. Dillard's raised the preclusive effect of the Bankruptcy Court's judgment, but the Diamondback Parties argued that they were not parties to the bankruptcy litigation and in fact had no knowledge of it.[3] The Arizona trial court denied the cross-motions for summary judgment without explanation.

In briefing following a bench trial, Dillard's again argued that the Bankruptcy Court's summary judgment barred the Diamondback Parties from recovering under principles of preclusion. The Arizona court decided the case in favor of the Diamondback Parties on May 16, 2003,

[3] As required by this Court's Rule 14.1(g)(1), Appendix E (A-26) catalogues the occasions on which Dillard's asserted the preclusive effect of the Bankruptcy Court's judgment before the Arizona courts.

concluding that they were third-party beneficiaries of the Transition Agreement and that Dillard's had breached that agreement. With respect to the Bankruptcy Court's judgment, which had by then been affirmed by the District Court, the Arizona court's Minute Entry stated that "the Court is not convinced that the bankruptcy [court] considered all of the issues involved." (A-21.) However, the court also remarked that if it were "bound by the Bankruptcy Court's rulings, obviously this ruling is incorrect." (A-21.)

The evidence on the Diamondback Parties' motion to recover attorneys' fees showed that they *had* been aware of the Bankruptcy Court litigation and, in fact, had been invited to intervene by the Trustee. Dillard's moved the trial court to reconsider its judgment, arguing that this new evidence directly contradicted the Diamondback Parties' earlier representations to the court and strengthened Dillard's preclusion arguments. The trial court denied Dillard's motion for reconsideration without comment.

The Arizona Appeal

On Dillard's appeal to the Arizona Court of Appeals, the parties joined issue on the preclusive effect of the Bankruptcy Court's judgment and, in particular, on the question of privity between the Trustee and the Diamondback Parties. The Court of Appeals agreed with Dillard's that the Diamondback Parties were not third-party beneficiaries of the Transition Agreement, but the court affirmed the judgment of the trial court on the Diamondback Parties' alternative theory of unjust enrichment. The Court of Appeals acknowledged that Dillard's had been granted judgment in the Trustee's litigation but concluded

that because it had rejected the third-party-beneficiary claim, it did not need to address Dillard's preclusion arguments. (A-9.)

In its petition for review addressed to the Arizona Supreme Court, Dillard's again argued that the Bankruptcy Court's decision was preclusive and that the Diamondback Parties were in privity with the Trustee. The Arizona Supreme Court denied review without comment. (A-18.)

REASONS FOR GRANTING THE PETITION

In this case, the Arizona Court of Appeals concluded that the Diamondback Parties should be permitted to pursue claims against Dillard's that are wholly derivative of the business relations between ETM and Dillard's, even though the Bankruptcy Court had determined already that the Trustee could not recover from Dillard's. This conclusion is inconsistent with this Court's decision in *Heiser v. Woodruff*, 327 U.S. 726 (1946), and with decisions of four federal courts of appeals and one state court of last resort. This Court should grant a writ of certiorari to resolve this conflict and to re-emphasize the fundamental importance of finality in bankruptcy-related litigation.

I. The Decision Below Is Inconsistent With *Heiser v. Woodruff*, 327 U.S. 726 (1946).

The Arizona courts' treatment of Dillard's preclusion argument conflicts with established precedent of this Court. *Heiser v. Woodruff*, 327 U.S. 726 (1946), arose from a bankruptcy case in Oklahoma in which the principal

issue was the allowance of a large claim of Heiser, a judgment creditor. *Id.* at 729. The trustee and the debtor filed a joint motion in federal district court in California, where the initial litigation had been conducted, seeking to set aside the judgment as having been procured by fraud. *Id.* at 730. That motion was denied, and the Ninth Circuit affirmed. *Id.* at 731; *see also Jackson v. Heiser*, 111 F.2d 310 (9th Cir. 1940). In the bankruptcy case, the trustee, the debtor, and several creditors objected to the allowance of Heiser's claim, raising allegations of fraud and perjured testimony. 327 U.S. at 728; *see also Woodruff v. Heiser*, 150 F.2d 869, 870 (10th Cir. 1945) (identifying objecting creditors), *rev'd*, 327 U.S. 726 (1946). The bankruptcy referee disallowed Heiser's claim, but the district court allowed it, citing res judicata. 327 U.S. at 728. The Tenth Circuit reversed the district court. *Id.*

This Court identified the controlling principle of the case as follows:

> At least to the extent that the issue of fraud raised by the objections to [Heiser's] claim as between [Heiser] and the bankrupt has been litigated and decided before the bankruptcy and has since been litigated between [Heiser] and the trustee in bankruptcy, *who represents the bankrupt and his creditors*, that issue is now res judicata and may not further be litigated in the bankruptcy proceeding.

Id. at 734 (emphasis added). Reviewing the earlier proceedings, the Court determined that "the alleged fraud was put in issue and the issue was decided against the trustee, the bankrupt *and those whom they represent or who claim under them*, for failure of proof." *Id.* at 735

(emphasis added). Accordingly, this Court reversed the Tenth Circuit's decision. *Id.* at 740.[4]

The decision below is squarely inconsistent with this Court's teaching in *Heiser*. In both cases, a federal bankruptcy trustee unsuccessfully litigated against a creditor, after which another creditor attempted to litigate the same or closely related issues against the same defendant. Although *Heiser* makes it clear that a trustee's failure should bring an end to estate-related litigation against a particular defendant, the Arizona courts in the case below permitted the Diamondback Parties to recover against

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[4] *Heiser* is consistent with the earlier case of *Winchester v. Heiskell*, 119 U.S. 450 (1886). That case involved a bankruptcy assignee's unsuccessful opposition to a claim for attorneys' fees by lawyers who had represented the debtor in pre-bankruptcy litigation. *Id.* at 451. After the attorneys prevailed and purchased the debtor's real property at a sale held to satisfy their attorneys' lien, another creditor brought suit against the attorneys, claiming a superior interest in the property. *Id.* The Tennessee Supreme Court rejected the creditor's claim. This Court declared that the issue before it was "whether the state court had jurisdiction so as to bind those who were parties to the [first] suit, *and those whom the parties in law represented.*" *Id.* at 453 (emphasis added). On rehearing, this Court clarified that the latter category "certainly includes the general creditors of the bankrupt." *Winchester v. Heiskell*, 120 U.S. 273, 274 (1887).

To the same effect are cases binding creditors to the outcome of litigation involving receivers and bondholder trustees. *See, e.g., Shaw v. Little Rock & Ft. Smith R.R. Co.*, 100 U.S. 605, 611 (1880) (bondholder trustee); *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U.S. 741, 745 (1877) ("It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed."); *Atlantic Trust Co. v. Dana*, 128 F. 209, 222 (8th Cir. 1903) ("The creditors, Dana & Whiting, were not actual parties to the Strong suit, but they were represented by the receiver, and are as much bound by the decree as he is."); *Lamson v. Towle-Jamieson Investment Co.*, 245 N.W. 627, 628 (Minn. 1932) (receiver).

Dillard's on claims that are directly contrary to the summary judgment awarded to Dillard's by the Bankruptcy Court. This Court should grant a writ of certiorari to confine the Arizona courts within the bounds of this Court's precedents.

II. The Arizona Court Of Appeals' Decision Conflicts With Decisions By Several Federal Courts Of Appeals And State Courts Of Last Resort.

Both federal and state courts face preclusion issues arising from bankruptcy litigation with some regularity. Absent unusual circumstances not present in the case below, the federal courts of appeals and state courts of last resort have concluded that bankruptcy trustees and the creditors they represent are privies for purposes of claim and issue preclusion.

Three federal courts of appeals and the Supreme Court of Idaho have held that unsecured creditors are in privity with a bankruptcy trustee and are thus precluded from pursuing litigation following the trustee's settlement of claims against the same defendant. *In re Medomak Canning*, 922 F.2d 895, 903 (1st Cir. 1990); *In re Fortier*, 161 Fed. Appx. 514, 517 (6th Cir. 2005); *In re Dominelli*, 820 F.2d 313, 317 (9th Cir. 1987); *Farmers Nat'l Bank v. Shirey*, 878 P.2d 762, 768 (Idaho 1994).[5] *See generally*

[5] In both *Medomak Canning* and *Farmers Nat'l Bank*, claim preclusion principles barred litigation by parties that held liens on their respective debtors' property. *See Medomak Canning*, 922 F.2d at 901; *Farmers Nat'l Bank*, 878 P.2d at 765. For bankruptcy purposes, however, the precluded party in each case was an unsecured creditor, because the value of its collateral was insufficient to pay senior lienholders in full. *See Associates Commercial Corp. v. Rash*, 520 U.S.

(Continued on following page)

Restatement (Second) of Judgments § 41(1)(a) (stating that a person is bound by a judgment when represented by a trustee of an estate of which the person is a beneficiary). Similarly, the Seventh Circuit has held that when creditors litigate unsuccessfully, res judicata bars a later-appointed trustee from commencing related litigation. *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). *Cf. Smith v. Litton*, 188 S.E. 214 (Va. 1936) (holding that because sole creditor was equitably estopped to pursue litigation, trustee also was estopped).

Other courts have concluded that trustees and unsecured creditors are not privies for preclusion purposes in particular circumstances. *See, e.g., Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir.) (holding that creditors, who also were judgment creditors of defendant sued by trustee, were not bound by trustee's settlement with defendant), *cert. denied*, 519 U.S. 816 (1996); *In re L&S Industries, Inc.*, 989 F.2d 929, 934-35 (7th Cir. 1993) (concluding that guarantors of debtor's obligations were not in privity with trustee in litigation with obligee); *United States v. Wilson*, 974 F.2d 514, 519 (4th Cir. 1992) (stating, without explanation, that IRS was not in privity with trustee), *cert. denied*, 507 U.S. 945 (1993).

In the interest of uniformity, this Court should grant a writ of certiorari in this case to resolve the split in authority between the Arizona courts and the other courts cited above.

953, 956 (1997) (discussing bifurcation of claims into secured and unsecured claims under 11 U.S.C. § 506(a)).

III. Trustee-Creditor Privity Is An Important Question Of Federal Law That Should Be Settled By This Court.

Two important and related principles are at stake in this case: the finality of bankruptcy-court decisions and the efficient administration of bankruptcy estates for the benefit of creditors. Both principles have established pedigrees in this Court.

In the context of bankruptcy disputes, as in other situations, this Court has long acknowledged and implemented the principle that there must be an end to litigation. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Heiser*, 327 U.S. at 733. Trustees, debtors-in-possession, creditors, and those targeted in bankruptcy litigation must know when litigation has reached a conclusion if timely distributions are to be made to creditors, balance sheets are to be restructured, and debtors are to emerge from bankruptcy with the "fresh start" authorized by Congress. *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 996 (2006).

Indeed, the importance of finality in bankruptcy is such that some of the most important decisions made in bankruptcy cases are effectively insulated from review even on direct appeal. *See, e.g.*, 11 U.S.C. § 363(m) (providing that reversal of order authorizing sale of property does not affect validity of sale, absent stay pending appeal); *id.* § 364(e) (providing that reversal or order authorizing post-bankruptcy financing does not affect validity of debt or liens, absent stay pending appeal); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143-45 (2d Cir. 2005) (affirming, under "equitable mootness" doctrine, confirmation of reorganization plan despite lack of factual foundation for extraordinary provisions).

In addition to *Heiser*, discussed above, other cases involving the preclusive effect of bankruptcy judgments have come before this Court. In *Stoll*, the Court reversed a judgment of the Illinois Supreme Court, holding that a prior adjudication by a federal district court sitting in bankruptcy that it had jurisdiction in a reorganization case precluded re-examination of the jurisdictional question in the Illinois courts. *Stoll*, 305 U.S. at 172. The Court reached a similar conclusion in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377-78 (1940), even though the bankruptcy statute under which the first judgment had been rendered was later declared to be unconstitutional.

This Court also has considered the difficulties caused when both bankruptcy trustees and creditors seek to commence litigation against third parties. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), the issue before the Court was somewhat different: whether a bankruptcy trustee had standing to pursue litigation on behalf of the debtor's debentureholders against their indenture trustee. Nevertheless, one of this Court's principal reasons for concluding that the bankruptcy trustee lacked standing to sue on behalf of the debentureholders is instructive here; the Court expressed concern about a "proliferation of litigation" because of debentureholders' independent pursuit of their claims against the indenture trustee and remarked that "a question would arise as to who was bound by any settlement." *Id.* at 432. Several decades later, the Court addressed the complications that might result if parties other than the trustee were permitted to bring suit under 11 U.S.C. § 506(c). *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000) ("Allowing recovery to be sought at the

behest of parties other than the trustee could therefore impair the ability of the bankruptcy court to coordinate proceedings, as well as the ability of the trustee to manage the estate.").

These cases underscore the practical significance of this case. Bankruptcy is a collective proceeding, with the property interests of the debtor assigned to an estate under the administration of a trustee. 11 U.S.C. §§ 541(a), 323.[6] Property of the bankruptcy estate includes all of the debtor's causes of action. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). The trustee "has a unique role in bankruptcy proceedings," *Hartford Underwriters*, 530 U.S. at 7, which includes the responsibility to collect, liquidate, and distribute to creditors the property of the estate, 11 U.S.C. §§ 704(1), 726. Accomplishing that task frequently requires the trustee to threaten and commence litigation against creditors and other parties.

Many bankruptcy disputes lead to settlements approved by the bankruptcy court pursuant to Federal Rule of Bankruptcy Procedure 9019. Others result in judgments, which may be subject to one or more appeals. *See* 28 U.S.C. § 158. But in either situation – settlement or litigated conclusion – both the trustee and the defendant must be able to rely on the finality of the outcome if estates are to be closed promptly and creditors treated fairly. *See* 11 U.S.C. § 704(1) (requiring trustee to close estate "as expeditiously as is compatible with the best

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[6] In a Chapter 11 bankruptcy case, the debtor-in-possession ordinarily acts as the representative of the bankruptcy estate, with substantially all of the powers otherwise available to a trustee, unless the court orders the appointment of a trustee for cause. *See* 11 U.S.C. §§ 1104, 1107(a).

interests of parties in interest"); H.R. Rep. No. 95-595, at 178 (1977) (discussing "prime bankruptcy policy of equality of distribution among creditors of the debtor"), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138.

A bankruptcy trustee represents the interests of creditors. *Heiser*, 327 U.S. at 734 (trustee "represents the bankrupt and his creditors"); *Schuyler v. Littlefield*, 232 U.S. 707, 713 (1914) (trustee "represents all of the creditors"); *cf.* 11 U.S.C. § 702 (establishing procedures for creditors to elect trustee). If creditors are free to circumvent the resolution of litigation between their representative and a third party by asserting duplicative or inconsistent claims against that third party, chaos is a likely result. *See Caplin*, 406 U.S. at 432; *Hartford Underwriters*, 530 U.S. at 12. But at the very least, defendants otherwise inclined to settle significant litigation (which ordinarily is an outcome to be encouraged) will be less willing to do so because of finality concerns, will reduce their monetary offers, or will require conditions to a settlement that will create additional burden and expense on bankruptcy estates, such as requiring trustees to obtain enforceable injunctions preventing creditors from pursuing parallel litigation. *See, e.g., In re Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) (affirming such an injunction). Trustees in cases such as this one also will be faced with proofs of claim – some ripe and some filed for anticipatory purposes – seeking to recover from the estate on theories of subrogation, reimbursement, and contribution, all of which are subject to special treatment under the Bankruptcy Code. *See* 11 U.S.C. §§ 502(e), 509.

To be sure, in many situations, creditors may have causes of action against third parties that are not derivative of the debtor or the bankruptcy estate, such as the

debentureholders' right of action against their indenture trustee in *Caplin*. With only limited exceptions, these claims are not displaced by a trustee's right to pursue causes of action on behalf of the estate. *But see* 11 U.S.C. § 544(b)(1) (empowering trustee to "avoid any transfer of an interest in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim"). Because such causes of action are independent of the bankruptcy process, creditors' pursuit of them does not, absent extraordinary circumstances, threaten the finality of bankruptcy proceedings, result in unfairly disparate treatment of creditors, or delay the administration of bankruptcy estates.

By contrast, the claims on which the Diamondback Parties succeeded in the case below – breach of contract in the trial court and unjust enrichment on appeal – arise from the same transactions challenged, unsuccessfully, by the Trustee in his litigation against Dillard's. The decision of the Arizona Court of Appeals in favor of the Diamondback Parties on these derivative claims has troubling implications for the administration of bankruptcy estates. Because the Diamondback Parties have obtained a judgment for their own benefit after the Trustee failed to recover from Dillard's, they have obtained a decided advantage over other creditors of ETM. And they have done so after declining an invitation by the Trustee to participate in his litigation. Such an outcome is neither fair nor equitable to the Trustee, the creditors he represents, or Dillard's. This Court should grant certiorari in this case to address the important issues raised by the Arizona courts' failure to bind the Diamondback Parties to the results of their representative's litigation against Dillard's.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 2006

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS; PHOENIX SUNS LIMITED PARTNERSHIP d/b/a/ PHOENIX SUNS; PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs-Appellees, v. DILLARD'S, INC., a Delaware corporation, f/k/a Dillard Department Stores, Inc., Defendant-Appellant.	1 CA-CV 04-0338 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) (Filed Jun. 7, 2005)

Appeal from the Superior Court in Maricopa County
Cause No. CV 00-012428
The Honorable Michael J. O'Melia, Judge

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART

Gallagher & Kennedy — Phoenix
By Mark Deatherage
Joseph E. Cotterman
Attorneys for Plaintiffs-Appellees

Bryan Cave LLP — Phoenix
By Robert W. Shely
Rodney W. Ott
Attorneys for Defendant-Appellant

SNOW, Judge

¶1 Dillard's appeals a judgment in favor of Plaintiffs-Appellees: AZPB Limited Partnership d/b/a Arizona Diamondbacks, Phoenix Suns Limited Partnership d/b/a/ Phoenix Suns, and Phoenix Arena Sports Limited Partnership.[1] For the following reasons we affirm in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 In 1992, the Phoenix Suns and America West Arena entered an agreement with Dillard's Box Office. The agreement called for Dillard's to sell tickets for events hosted by the Suns and/or the Arena. The fee charged to customers by Dillard's was the sum of the ticket price and a surcharge imposed by Dillard's. The revenues from the ticket sales were deposited into Dillard's central bank account. From that account Dillard's remitted the ticket price to the Suns, and kept only the surcharge.

¶3 In 1993 Dillard's Box Office transferred all assets and employees, including all the rights and obligations under the agreement, to Dillard Ticketing Systems, Inc. ("DTS") which was a wholly owned subsidiary of Dillard's. In 1997 the Arizona Diamondbacks entered an agreement with DTS similar to the agreement with the Suns in which DTS would sell tickets to Diamondbacks' baseball games.

¶4 In 1999 Dillard's sold 100% of its stock in DTS to Entertainment Network, Inc. ("ETM"). Dillard's, DTS and

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[1] This included the Phoenix Suns, the Phoenix Mercury, the Arizona Rattlers, and various other events taking place at America West Arena.

ETM entered into a transition agreement to "seek an orderly transition of the ownership of DTS, and in connection therewith desire that Dillard's continue to provide such services to DTS."

¶5 As part of the one-year agreement between DTS and Dillard's, Dillard's would "permit DTS to maintain ticket selling outlets in the locations in all Dillard's department stores." Dillard's would continue to directly collect revenues for tickets to the extent that they were sold and processed through Dillard's outlets. "Dillard's deposited cash and checks it received as payment for tickets into Dillard's store depository bank accounts, along with proceeds from all other merchandise or services sold during the day, and transferred all receipts to a consolidated Dillard's account at Chase Manhattan Bank in New York for disbursement to Dillard's for its store operations." Credit card payments for ticket sales "were transferred directly to the Chase Manhattan account, where they were consolidated with other funds collected during store operations." "From this account, Dillard's wired funds to ETM on a daily basis" in the amount of Dillard's store outlet ticket sales. On a weekly basis Dillard's wired funds to ETM for ticket sales at the phone room and non-Dillard third-party outlets. ETM then distributed the ticket price to its customers and retained the surcharge.

¶6 According to the transition agreement, Dillard's was required to front the cost of "credit card transaction fees" and "credit card charge backs" that would be reimbursed by DTS. In return for Dillard's services, DTS agreed to pay Dillard's a monthly fee comprised of various elements. In the event that DTS was late in paying the invoices generated by Dillard's, the agreement specified that DTS would pay a late fee to Dillard's, but that Dillard's had no right to

offset the monies owed from the total monies collected by Dillard's.

¶7 In addition, the agreement stated that

> nothing in this Agreement, express or implied, is intended to or shall confer upon any person any right, benefit or remedy of any nature whatsoever under or by virtue of this Agreement. Neither DTS, ETM nor Dillard's may assign or delegate any right or obligation hereunder without the prior written consent of the other parties.

¶8 ETM paid Dillard's monthly invoices in full through February 26, 2000. Thereafter, ETM failed to pay the Dillard's invoices. During the time when ETM had stopped paying Dillard's invoices, Dillard's continued to pay DTS and ETM all of the monies it collected for ticket sales. On June 9, 2000, however, just prior to the expiration of the transition agreement, Dillard's stopped remitting funds to ETM or DTS.

¶9 On June 22, 2000, Dillard's sent a letter to ETM stating that ETM had defaulted under the transition agreement by failing to make the "March, 2000 settlements and all payments due thereafter." The letter terminated the transition agreement and demanded payment of the monies owed to Dillard's totaling $1,440,354. On the same day, Dillard's sent a second letter to ETM stating that based upon ETM's default under the transition agreement, Dillard's would net the $1,440,345 it was owed from the amounts it owed ETM. On June 23, 2000, Dillard's sent ETM a letter indicating that after Dillard's applied the threatened offset, the net due ETM was $1,452,475.60, which it remitted to ETM.

¶10 On June 28, and August 11, 2000 respectively, ETM and DTS filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Central District of California. The bankruptcy cases were consolidated by an order from the bankruptcy court. The bankruptcy trustee thereafter filed a seven count complaint against Dillard's to recover the funds that Dillard's had withheld. The complaint raised various theories including breach of contract. The Bankruptcy court granted Dillard's motion for summary judgment on all counts and entered judgment in Dillard's favor on February 21, 2003.

¶11 The Plaintiffs filed suit against Dillard's seeking to recover the face value of the tickets sold by Dillard's pursuant to the transition agreement. In their complaint, the Plaintiffs alleged various causes of action, including that they were third-party beneficiaries under the transition agreement and were thus entitled to sue for breach. They also alleged that they were entitled to relief under theories of conversion, unjust enrichment, and constructive trust.

¶12 Dillard's waived the right to a jury trial and the case was tried to the court on December 18, 2002. Three witnesses testified in person and the parties also stipulated to the admission of testimony in various depositions. The parties further agreed to waive oral argument and to submit post-trial memoranda and supplemental pleadings to the court.

¶13 The court awarded judgment to the Plaintiffs. In its minute entry explaining its decision, the court found

> that Section 2.1 of the Transition Agreement does not allow for Dillard's to keep the entire amounts of money that it collected. They were not entitled

> to offsets, and Dillard's knew that most of this money belonged to ETM's clients.
>
> The Court specifically finds that these Plaintiffs are third party beneficiaries under the agreement between Dillard's and ETM. That other people (businesses, etc.) were benefitting was clear from the testimony, and all parties knew that.

¶14 Following a denial of a motion for reconsideration, the court signed a judgment for the Diamondbacks in the amount of $289,656 plus $86,896.80 in interest and for the Phoenix Arena Development Limited Partnership and Phoenix Arena Sports Limited Partnership in the amount of $571,445 plus $171,433.50 in interest. The court also awarded the Plaintiffs $100,605 in attorneys' fees and costs. This appeal was timely filed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶15 Dillard's raises four arguments on appeal: (1) the trial court erred in its determination that Plaintiffs could sue as third-party beneficiaries under the transition agreement; (2) the trial court erred by providing the Plaintiffs better rights and remedies under the transition agreement than were available to ETM as already adjudicated by the bankruptcy court; (3) the trial court erred when it first excluded briefs from the bankruptcy court and then erred in its evaluation of the evidence actually provided to the bankruptcy court; and (4) the trial court abused its discretion in its award of attorneys' fees.

¶16 In response, the Plaintiffs assert that they are third-party beneficiaries, and even if they are not, we may affirm on any ground supported by the record. *Am. Family Mut. Ins. Co. v. Cont'l Cas. Co.*, 200 Ariz. 119, 121, ¶ 9, 23 P.3d 664, 666 (App. 2001) (citing *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App.1996)). They assert that the judgment should be affirmed based on their causes of action for conversion, violation of a bailment relationship, constructive trust, unjust enrichment, or intentional interference with a business contract; all were counts alleged in their complaints.

I. Plaintiffs Are Not Third-Party Beneficiaries

¶17 We review the interpretation of the transition agreement *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003) (citations omitted).

¶18 Dillard's argues that the Plaintiffs were not third-party beneficiaries to the transition agreement. We agree. In Arizona, "for a person to recover as a third-party beneficiary of a contract, an intention to benefit that person must be indicated in the contract itself, [t]he contemplated benefit must be both intentional and direct, and it must definitely appear that the parties intend to recognize the third[-]party as the primary party in interest." *Norton v. First Fed. Sav.*, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981) (citations and quotations omitted).

¶19 An intended third-party beneficiary is entitled to performance of the contract "to effectuate the intentions of the parties, and the circumstance[s] indicate that the promisee intended to give the beneficiary the benefit of the promised performance." *Supplies for Indus., Inc. v. Christensen*, 135 Ariz. 107, 109, 659 P.2d 660, 662 (App. 1983)

(citation omitted). Thus, an intended third-party beneficiary of a contract may sue to enforce the terms of the contract. *Id.*

¶20 In section 2.1 of the transition agreement, DTS was required to pay Dillard's monthly fee comprised of charges for accounts payable, costs of financial reports, amounts of rental charges, charges for programming services, and the monthly outlet services fee earned by Dillard's. Further, "[l]ate payments of invoices [by DTS] will not entitle Dillard's to offset delinquent payment amounts against cash receipts from ticket sales to be remitted by Dillard's to DTS, but will be subject to a late charge of one and one-half percent (1½%) per month." The Plaintiffs argue, however, that because Dillard's was contractually prevented from offsetting any unpaid fees on behalf of ETM, this created third-party beneficiary status in them. We disagree.

¶21 The Plaintiffs did not receive a direct benefit from, nor were they the primary beneficiaries of, the transition agreement. Although section 2.1 of that agreement arguably benefits the parties contracting with ETM, it would not necessarily do so. That provision directly benefits ETM in the event that ETM was late in payment of its monthly fee by assuring ETM that it would continue to receive revenue from Dillard's ticket sales. But nothing in the agreement required ETM to use that revenue stream to pay its ticket suppliers. ETM is therefore the direct and primary beneficiary of section 2.1, not the Plaintiffs. *Norton,* 128 Ariz. at 178, 624 P.2d at 856.

¶22 Further, the transition agreement itself specifies that there are no third-party beneficiaries: "nothing in this Agreement, express or implied, is intended to or shall

confer upon any person any right, benefit or remedy of any nature whatsoever under or by virtue of this Agreement." Although Appellees argue that this provision was not important to the negotiation of the transition agreement, the language of the transition agreement is the most persuasive evidence of its meaning. *Campisano v. Phillips,* 26 Ariz. App. 174, 178, 547 P.2d 26, 30 (1976) ("[T]he plain language of the contract must control.").[2] It is also undisputed that Dillard's was aware of many of ETM's contractual obligations. Standing alone, however, Dillard's awareness of ETM's other contractual relationships does not create third-party beneficiary status in those contracting parties.

¶23 Because Plaintiffs are not directly benefitted by the transition agreement and they are not primary beneficiaries of the transition agreement, they are not third-party beneficiaries to the transition agreement. *Norton,* 128 Ariz. at 178, 624 P.2d at 856, *Christensen*, 135 Ariz. at 109, 659 P.2d at 662. Thus, the trial court's judgment cannot be affirmed on that basis. We thus now examine the alternative theories of recovery asserted by Plaintiffs.[3]

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[2] Although Plaintiffs are mentioned in the transition agreement, it is in the context of the length of time Dillard's would permit DTS to use Dillard's facilities to sell tickets for the Plaintiffs, and not in terms of any rights Plaintiffs might have to payments under the agreement.

[3] Because we find the trial court erred in its determination that Plaintiffs were third-party beneficiaries to the contract, we need not address Dillard's arguments that the trial court erred in granting better rights to Plaintiffs than were otherwise available to ETM under the transition agreement or that the trial court erred in its use of documents and arguments from the bankruptcy court proceeding.

II. Alternative Remedies

A. Conversion

¶24 "Conversion is defined as an act of wrongful dominion or control over personal property in denial of or inconsistent with the rights of another." *Case Corp. v. Gehrke,* 208 Ariz. 140, 143, ¶ 11, 91 P.3d 362, 365 (App. 2004) (citations and quotations omitted). "[M]oney can be the subject of a conversion claim if the money can be described, identified, or segregated, and an obligation to treat it in a specific manner is established." *Id.* (citation and quotation omitted); *Autoville, Inc. v. Friedman,* 20 Ariz. App. 89, 91, 510 P.2d 400, 402 (1973).

¶25 Here, it is undisputed that Dillard's sold Plaintiff's tickets and then withheld the monies from ETM. However, there was no obligation on the part of Dillard's to segregate monies that ETM would pass on to clients from the monies that ETM might keep or might remit to Dillard's, and the Plaintiffs have not argued that they maintained a security interest in those funds. Thus, Plaintiffs cannot maintain a claim for conversion. *Gehrke*, 208 Ariz, at 145, ¶ 22, 91 P.3d at 367 (conversion action may be maintained for money, but only if the money is described, identified, or segregated and there is an obligation on the part of defendant to treat it in a particular manner); *Autoville,* 20 Ariz. App. at 92, 510 P.2d at 403 (when plaintiff had no right to trace specific funds that were not segregated by defendant he could not claim conversion on the part of defendant).

B. Violation of a Bailment Relationship

¶26 A bailment relationship is created when one party delivers personal property to another to be held in trust for a specific purpose with the agreement that the property

will be returned or accounted for when that purpose is accomplished *Nava v. Truly Nolen Exterminating of Houston, Inc.*, 140 Ariz. 497, 500, 683 P.2d 296, 299 (App. 1984). Such a relationship can be based on either an express or implied bailment agreement between the parties. *Id.* A bailor owes a duty to the bailee to use reasonable care to keep the subject of the bailment reasonably safe. *Cindrich v. Fireman's Fund Ins. Co.*, 6 Ariz. App. 371, 372, 432 P.2d 919, 920 (1967).

¶27 Here, the transition agreement may have created some type of a bailment relationship between Dillard's and DTS. However, it is not clear from our review of the record that Plaintiffs had such a relationship with Dillard's. Nor do Plaintiffs point us to testimony in the record that would establish such a relationship. Dillard's was not obliged under the agreement to account for the ticket sales to the Plaintiffs here. Rather, it was required to return funds to DTS. Thus, we cannot affirm the trial court's judgment on the basis of a bailment relationship. *Nava*, 140 Ariz. at 500, 683 P.2d at 299.

C. Constructive Trust

¶28 "A constructive trust is an equitable remedial device, generally used to prevent unjust enrichment." *Burch & Cracchiolo, P.A. v. Pugliani*, 144 Ariz. 281, 285, 697 P.2d 674, 678 (1985) (citation omitted); *Amator v. Amator*, 114 Ariz. 226, 232-33, 560 P.2d 410, 416-17 (1977); *In re Estate of Rose v. Transamerica Title Ins. Co.*, 108 Ariz. 101, 104, 493 P.2d 112, 115 (1972); *Harmon v. Harmon*, 126 Ariz. 242, 244-45, 613 P.2d 1298, 1300-01 (App. 1980); *Amtitle Trust Co. v. Fitch*, 25 Ariz. App. 182, 185, 541 P.2d 1166, 1169 (1975). Before a constructive

trust may be imposed, however, specific property belonging to the claimant must be identified. *Burch & Cracchiolo,* 144 Ariz. at 286, 697 P.2d at 679 (citation omitted).

¶29 Appellants allege that Plaintiffs claim for a constructive trust is merely a claim for general money damages and not a claim for funds that are "sufficiently identified" to give rise to a constructive trust claim. *Id.* at 285, 697 P.2d at 678 ("A general claim for money damages will not give rise to a constructive trust.") (citing *Amtile Trust Co.,* 25 Ariz. App. at 184, 541 P.2d at 1168; *Johnson v. Am. Nat. Ins. Co.,* 126 Ariz. 219, 223, 613 P.2d 1275, 1279 (App. 1980)) (citations omitted). However, because we hold that Plaintiffs may recover under a theory of unjust enrichment, we need not decide whether the specific remedy of a constructive trust might be available in this case.

D. Unjust Enrichment

¶30 At the trial court, Plaintiffs argued that to allow Dillard's to retain funds that it knew did not belong to Dillard's would constitute unjust enrichment. The court, within its equitable powers, may provide relief in equity to avoid unjust enrichment. *In re Krohn,* 203 Ariz. 205, 213, ¶ 33, 52 P.3d 774, 782 (2002) (citing *Sparks v. Douglas & Sparks Realty Co.,* 19 Ariz. 123, 129, 166 P. 285, 288 (1917)). "Unjust enrichment occurs when one party has [] retain[ed] money or benefits that in justice and equity belong to another." *Trustmark Ins. Co. v. Bank One, Ariz., N.A.*, 202 Ariz. 535, 541, ¶ 31, 48 P.3d 485, 491 (App. 2002) (citing *City of Sierra Vista v. Cochise Enter., Inc.,* 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984)). "To establish a claim for unjust enrichment, a party must show: (1) an

enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy."[4] *Id.* (citation omitted).

¶31 Here, the trial court determined "Dillard's knew that most of this money belonged to ETM's clients." There is adequate evidence in the record to support that finding. *Am. Family,* 200 Ariz. at 121, ¶ 9, 23 P.3d at 666. The withholding of funds that properly belonged to ETM is sufficient to create an enrichment in Dillard's and an impoverishment in Plaintiffs. Dillard's does not dispute the evidence that according to Plaintiffs' contracts with ETM, the Plaintiffs were owed monies that were not paid. Nor do they dispute that the source of income to ETM from which ETM would pay its debts to Plaintiffs was from ticket sale revenues that were to be remitted to ETM by Dillard's.

¶32 Several transcripts of, deposition testimony were introduced at trial. Steve Nelson, an employee of Dillard's, testified in his deposition that Dillard's was paid according to the transition agreement by revenues generated from tickets from ETM clients. Dean Worley, the assistant attorney general for Dillard's, testified in his deposition that the Arizona Diamondbacks and the Phoenix Suns

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[4] There are alternative formulations of the elements required for unjust enrichment. *See, e.g., USLife Title Co. of Ariz. v. Gutkin,* 152 Ariz. 349, 354, 732 P.2d 579, 584 (App. 1986) ("[T]o prevail upon a theory of unjust enrichment, a plaintiff must establish that, (1) plaintiff conferred a benefit upon the defendant; (2) defendant's benefit is at plaintiff's expense and (3) it would be unjust to allow defendant to keep the benefit.") (citations omitted).

were two of the clients of DTS.[5] He also testified that the primary source of funds that Dillard's had in its possession originated directly from ticket sales.

¶33 Dillard's also knew that it did not own the tickets it was selling. According to the transition agreement, Dillard's was only entitled to collect the proceeds of ticket sales on behalf of ETM and then remit all of those proceeds to ETM. Dillard's would then bill ETM for the costs and services rendered according to the transition agreement. Thus, Dillard's was aware that it did not have an ownership interest in the ticket sale proceeds.

¶34 Moreover, Dillard's stipulated at trial that it withheld funds from ETM after ETM failed to pay regular invoices. Although part of the money that Dillard's withheld from ETM may have been equivalent to the amount of money that ETM owed to Dillard's under the transition agreement, the actual monies withheld by Dillard's did not belong to Dillard's nor did the bulk of it belong to ETM. Dillard's stipulated in the joint pretrial statement that some portion of the monies collected through ticket sales and remitted to ETM would be turned over to clients of ETM.

¶35 Finally, we have found that there was no available legal remedy for Plaintiffs under principles of contract or tort law. Thus, an equitable remedy may be imposed. We find that there is sufficient evidence in the record to affirm the trial court's judgment that Dillard's was unjustly

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[5] As part of a joint pretrial statement, Dillard's stipulated that at the time of the transition agreement "Dillard's understood that the Phoenix Suns, Diamondbacks, and the America West Arena were DTS' largest clients."

enriched because it retained some monies that in equity belonged to clients of ETM. *Trustmark,* 202 Ariz. at 541, ¶ 31, 48 P.3d at 491.

¶36 The trial court also found that "Plaintiff America West Arena is entitled to $571,445 and Arizona Diamondbacks is entitled to $289,656. The testimony establishes these figures came from Dillard's own records." Dillard's does not challenge the trial court's statement or its calculation on appeal. Nor does it challenge the trial court's award of interest to the Plaintiffs. There is evidence in the record to support these amounts. *Am. Family,* 200 Ariz. at 121, ¶ 9, 23 P.3d at 666. Thus, we affirm the award of the trial court.

III. Attorneys' Fees

¶37 Finally, Dillard's argues that the trial court abused its discretion in awarding attorneys' fees and costs.

¶38 In general, "[a]ttorney's fees are not recoverable without either a contractual or statutory basis for their award." *Turf Paradise, Inc. v. Maricopa County,* 179 Ariz. 337, 342, 878 P.2d 1375, 1380 (App. 1994) (citing *State Farm Mut. Auto. Ins. Co. v. O'Brien,* 24 Ariz. App. 18, 22, 535 P.2d 46, 50 (1975)); *see also Cal. Cas. Ins. Co. v. Am. Family Mut. Ins. Co.,* 208 Ariz. 416, 422, ¶¶ 23-24, 94 P.3d 616, 622 (App. 2004) (The cause of action must not merely mention a contract in passing; the contract must be essential to the cause of action.) (citations omitted). Here, the trial court awarded attorneys' fees and costs to Plaintiffs under section 4.8 of the transition agreement or A.R.S. § 12-341.01(A) (2003). Under either theory, the application of the statute presumes that Plaintiffs were successful in their suit "aris[ing] out of a contract." *Id.*

¶39 We have found that no contract defined the relationship between Dillard's and Plaintiffs. We have instead affirmed the award on the basis of unjust enrichment.

¶40 Under some equitable circumstances, an award of attorneys' fees pursuant to A.R.S. § 12-341.01 may be appropriate. *See Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, 37, ¶ 11, 992 P.2d 1128, 1132 (App. 1998) ("[I]f [the] claim [] would not exist but for a contract, the claim may be characterized as arising out of contract and § 12-341.01 applies, permitting a discretionary award of attorney[s'] fees. On the other hand, if the claim is based on an alleged breach of duties implied by law, rather than by an express contract or one implied by the facts, it is unlikely that the claim arises out of contract.") (citations omitted); *Pelletier v. Johnson*, 188 Ariz. 478, 482, 937 P.2d 668, 672 (App. 1996) (affirmed trial court award in quantum meruit and attorneys' fees under § 12-341.01(A) because "this essentially was a contested action arising out of a contract, express or implied.") (citation and quotations omitted); *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 57, 69, 703 P.2d 1206, 1218 (App. 1984), *aff'd in part by* 146 Ariz. 48, 51, 703 P.2d 1197, 1200 (1985) (affirming an award of attorneys' fees under the theory of quantum meruit because the action *sub judice* arose out of a contract sufficient for the statute even though no express contract existed between the parties) (quotations omitted). Under other equitable circumstances; however, an award of attorneys' fees in such cases is not appropriate. *See, e.g., State v. Martin*, 59 Ariz. 438, 448, 130 P.2d 48, 52 (1942) (equitable compensation is adequate and attorneys' fees are not awarded). Because we affirm on equitable (and not legal) principles we vacate the award of attorneys' fees, and remand for the trial court to determine whether an

award of attorneys' fees is appropriate under the circumstances of this case. We affirm the award of costs consistent with A.R.S. § 12-341 (2003).

CONCLUSION

¶41 For the foregoing reasons, we affirm the trial court's award of monetary damages and costs. We remand to the trial court for a determination of attorneys' fees consistent with this decision.

/s/ G. Murray Snow
G. Murray Snow, Presiding Judge

CONCURRING:

/s/ Patrick Irvine
Patrick Irvine, Judge

/s/ Patricia A. Orozco
Patricia A. Orozco, Judge

APPENDIX B

[SEAL]

Supreme Court

STATE OF ARIZONA

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NOËL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

February 8, 2006

RE: AZPB LIMITED PARTNERSHIP et al
v DILLARD'S INC
Arizona Supreme Court No. CV-05-0276-PR
Court of Appeals Division One No. 1 CA-CV 04-0338
Maricopa County Superior Court No. CV 00-012428

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 7, 2006, in regard to the above-referenced cause:

ORDERED: Defendant-Appellant Dillard's, Inc.'s Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellant Dillard's Inc] = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellees AZPB Limited Partnership/Phoenix Arena Development] = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 8th day of February, 2006.

Noël K Dessaint, Clerk

TO:
Mark Deatherage, Joseph E Cotterman and
Kiersten A Murphy, Gallagher & Kennedy
Robert W Shely and Rodney W Ott, Bryan Cave LLP
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
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APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-012428 05/16/2003

HON. MICHAEL J. O'MELIA

CLERK OF THE COURT
A. Beery
Deputy

FILED: 05/20/2003

AZPB LIMITED PARTNERSHIP, et al. MARK DEATHERAGE

v.

DILLARDS INC. ROBERT W SHELY

MINUTE ENTRY

This matter was tried to the Court, and after receiving post-trial memoranda and the last supplemental pleading and authorities submitted on April 10th, the Court makes the following rulings:

The Court has reviewed its trial notes and the exhibits, as well as the memoranda mentioned above. The Court finds that Section 2.1 of the Transition Agreement does not allow for Dillard's to keep the entire amounts of money that it collected. They were not entitled to offsets, and Dillard's knew that most of this money belonged to ETM's clients.

The Court specifically finds that these Plaintiffs are third party beneficiaries under the agreement between Dillard's and ETM. That other people (businesses, etc.) were benefiting was clear from the testimony, and all parties knew that.

In respect to the supplemental memoranda, the Court is not convinced that the bankruptcy considered all of the issues involved. The Motion for Summary Judgment filed in the Bankruptcy Court seemed to be for breach of contract and did not specify paragraph 2.1.

If this Court is bound by the Bankruptcy Court's rulings, obviously this ruling is incorrect.

The Court finds that the damage evidence was sufficient. All the testimony in respect to cash was that it was "minimal." It therefore is of no consequence. Plaintiff America West Arena is entitled to $571,445.00, and Arizona Diamondbacks is entitled to $289,656.00. The testimony establishes these figures came from, Dillards' own records.

While the Court has ruled in Plaintiffs' favor, the defenses in this case give the Court pause. The Court only mentions this because this may have an effect on any attorney's fees applications.

FILED: Exhibit Worksheet

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ETM ENTERTAINMENT NETWORK, INC., Debtor, --- JAMES J. JOSEPH, Chapter 7 Trustee, Appellant, v. DILLARD'S, INC.; DILLARD STORE SERVICES, INC., Appellees.	No. 03-55500 D.C. No. CV-02-04782-MLR **MEMORANDUM*** (Filed Oct. 3, 2005)
In re: ETM ENTERTAINMENT NETWORK, INC., Debtor, --- JAMES J. JOSEPH, Chapter 7 Trustee, Appellant, v. DILLARD'S, INC.; DILLARD STORE SERVICES, INC., Appellees.	No. 03-55501 D.C. No. CV-02-07683-MLR

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted September 12, 2005
Pasadena, California

Before: FARRIS, FERNANDEZ, and BYBEE Circuit Judges.

James J. Joseph, the trustee in bankruptcy (the Trustee) for ETM Entertainment Network, Inc., appeals the district court's affirmance of the bankruptcy court's grant of summary judgment to Dillard's, Inc., and Dillard Store Services, Inc. (collectively Dillard's) on the Trustee's preference and breach of contract claims against Dillard's. We affirm.

(1) Primarily, the Trustee asserts that Dillard's received a preference because it set off its claims for fees arising out of its contract with ETM against ETM's claim for ticket sale proceeds under the same contract. The Trustee relies upon the provisions of 11 U.S.C. §§ 547(b) and 550 in making that claim. However, what Dillard's effected was a recoupment. *See Sims v. United States Dep't of Health & Human Servs. (In re TLC Hosps., Inc.)*, 224 F.3d 1008, 1011 (9th Cir. 2000); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398-1400 (9th Cir. 1996); *State ex rel. Saif Corp. v. Harmon (In re Harmon)*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995).

The distinction is enormous. While setoff can, and often does, result in a preference, which can be attacked by the Trustee, recoupment is not a preference at all because it merely defines what the amount of the creditor's claim really is. *See Reiter v. Cooper*, 507 U.S. 258, 265 n.2, 113 S. Ct. 1213, 1218-19 n.2, 122 L. Ed. 2d 604 (1993);

Newbery, 95 F.3d at 1400; *Harmon*, 188 B.R. at 425; *see also Ashland Petroleum Co. v. Appel (In re B & L Oil Co.)*, 782 F.2d 155, 157-58 (10th Cir. 1986). Here, because the bankruptcy court properly applied the doctrine of recoupment, the Trustee's setoff claim must fail.[1]

(2) But, argues the Trustee, if Dillard's did recoup, it must have breached its contract with ETM and, therefore, a breach of contract action should lie. We disagree.

The Trustee bases his claim on a provision in the contract which precludes offset. However, recoupment is not offset, and the parties could have said recoupment, if they meant that. Secondly, the provision in question refers to "late payments" by ETM rather than a total breach or repudiation of the contract. It is one thing to be late in making a payment, it is quite another thing to stop paying entirely. Thirdly, ETM was not in a position to assert a right to recover from Dillard's on the basis of a contract that ETM had already breached.[2] *See United States ex rel.*

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[1] The Trustee also asserts claims under 11 U.S.C. § 553. However, the Trustee did not specifically allege an 11 U.S.C. § 553 claim in his complaint, nor did he ask the bankruptcy court for leave to amend his pleadings at any point. The issue was first raised in the Trustee's summary judgment reply brief, and the bankruptcy court's subsequent hearing and orders did not amend the pleadings. Nor were these claims actually litigated in the district court. The Trustee is therefore barred from raising § 553 claims in his appeal. *See* Fed. R. Civ. P. 15(b), incorporated by Fed. R. Bankr. P. 7015; *Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995); *see also Yadidi v. Herzlich (In re Yadidi)*, 274 B.R. 843, 851-52 (B.A.P. 9th Cir. 2002). Accordingly, the Trustee's argument fails.

[2] ETM's words and actions made it plain that it would not or could not perform the contract any longer. *See Fenix Cattle Co. v. Silver (In re Select-a-Seat Corp.)*, 625 F.2d 290, 292 (9th Cir. 1980); *see also In re Allegheny Imaging Inst.*, 69 B.R. 932, 935-36 (Bankr. W.D. Pa. 1987); *cf.* Restatement (Second) of Contracts § 241 (1981). Moreover, when asked,

(Continued on following page)

Palmer Constr., Inc. v. Cal State Elec., Inc., 940 F.2d 1260, 1261 (9th Cir. 1991). In short, the bankruptcy court did not err when it granted summary judgment to Dillard's on the Trustee's breach of contract claim.

AFFIRMED.

ETM repudiated by failing to give reasonable assurances that it would perform. *See Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 517-18 (9th Cir. 1987); Restatement (Second) of Contracts § 251 (1981).

APPENDIX E

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2. Defendant Dillard's, Inc.'s Post-Trial Brief – Liability, page 10.
3. Dillard's, Inc.'s Motion for Reconsideration, pages 2, 8-14.
4. Defendant Dillard's Supplement To Motion For Reconsideration, pages 3-13.

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5. Opening Brief of Defendant-Appellant Dillard's, Inc., pages 39-44.
6. Reply Brief of Defendant-Appellant Dillard's, Inc., pages 7-13, 15-22.
7. Defendant-Appellant Dillard's, Inc.'s Petition for Review [by the Supreme Court of Arizona], pages 5, 8-10.

(3)

No. 05-1422

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JUL 12 2006
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

AZPB LIMITED PARTNERSHIP,
d/b/a ARIZONA DIAMONDBACKS, AND
PHOENIX ARENA DEVELOPMENT
LIMITED PARTNERSHIP,

Respondents.

**On Petition For A
Writ Of Certiorari To The
Court Of Appeals Of Arizona, Division One**

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The caption of this case contains the names of all parties.

Respondents AZPB Limited Partnership d/b/a Arizona Diamondbacks, and Phoenix Arena Development Limited Partnership are privately owned limited liability corporations ("L.L.C."). They have no parent corporation, and there is no publicly held company that owns 10% or more of either L.L.C.

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Respondents AZPB Limited Partnership d/b/a Arizona Diamondbacks, and Phoenix Arena Development Limited Partnership (sometimes collectively referred to herein as the "Diamondbacks/Arena Parties") submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Dillard's, Inc. As explained more fully in the Facts and Procedural History section of the Arizona court of appeals' decision that is the subject of Dillard's Petition (*see* Petitioner's Appendix A), the Diamondbacks/Arena Parties sponsored and sold tickets to Arizona Diamondbacks games at Bank One Ballpark (now Chase Field), and to entertainment events at America West Arena (now US Airways Center).

Dillard's is a national retail chain that also owned a subsidiary called Dillard Ticketing Systems, Inc. ("DTS"). DTS had ticket service contracts with a number of client venues, including the Diamondbacks/Arena Parties, whereby DTS would sell tickets on behalf of the venues, collect the ticket sale proceeds, and then remit the clients' ticket proceeds back to them, keeping only a ticket surcharge fee that DTS charged the customers in addition to the face value price of the ticket.

Dillard's later sold DTS to a separate entity, ETM. Under the transition contract between Dillard's and ETM, Dillard's continued to assist ETM and to collect and process ticket revenues for ETM for a period of one year after the sale. This dispute arises from Dillard's decision to withhold a substantial amount of ticket revenues it had collected near the end of the transition period as an offset against monies ETM owed Dillard's, leaving ETM (who then filed bankruptcy) unable to remit the clients' ticket revenues back to them, including the Diamondbacks/Arena Parties.

SUMMARY OF ARGUMENT

Part III of the Rules of the Supreme Court of the United States addresses this Court's "Jurisdiction on Writ of Certiorari." According to Rule 10: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." In determining whether to accept jurisdiction over

a state court decision, the relevant criteria under this Court's holdings and Rules are whether the state court decided an important federal question in a manner that conflicts with decisions of another state court of last resort, a federal court of appeals, or this Court; whether the federal question was raised and argued below; and whether the purported error consisted of a misstatement of law or merely the misapplication of a properly stated rule of law.

In its statement of jurisdiction, Petitioner asserts that "[t]he preclusive effect of a judgment of a federal court is an issue of federal common law, . . . and that the state court disregarded a federal judgment . . . " Petition, p. 1. Petitioner argues that in rendering and affirming the Arizona judgment, the Arizona courts failed to give proper preclusive[1] effect to the previously entered judgment of the federal bankruptcy court in an action between Petitioner and the ETM bankruptcy estate, to which Respondents were not parties. However, this argument fails to establish this Court's jurisdiction, and fails to demonstrate "compelling reasons" for review, for four separate reasons:

(1) Throughout the Arizona proceedings, Petitioner based its preclusion arguments solely on Arizona law, without any reference to federal common law or citation to federal authorities on these issues. Thus, Petitioner cannot satisfy the requirement under this Court's jurisdictional principles and Rules that the purported federal question must have been raised, argued, and passed on as a federal question in the state court proceedings. Petitioner's focus below on Arizona rather than federal law also operates as a judicial admission and judicial estoppel to preclude Petitioner from now invoking federal common law.

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[1] Petitioner has variously described its argument as res judicata, claim preclusion, and issue preclusion. Those theories will sometimes be referred to collectively herein by the terms "preclusion" or "preclusive," which is the term used in Petitioner's statement of jurisdiction.

(2) The purported federal question is not an "important" one, because (a) the state court decision consists of an unpublished memorandum decision of the Arizona court of appeals that did not even mention, let alone decide, any federal law issues and that is thus unlikely to ever be found or cited in any litigation involving federal res judicata or preclusion issues, and (b) according to Petitioner, the federal law principles it espouses have been adequately and consistently stated by several federal appellate courts and by this Court, such that they do not need to be readdressed or reemphasized.

(3) The asserted error by the Arizona courts consists merely of an alleged misapplication of a rule of law, not a misstatement of federal law (which the Arizona decision did not even address).

(4) On the merits, the decision of the Arizona courts is not in material conflict with the decisions of any state court of last resort, any federal court of appeals, or this Court, nor do the doctrines of res judicata or claim or issue preclusion apply to bar the Arizona judgment.

REASONS THE PETITION SHOULD BE DENIED

I. PETITIONER'S FAILURE TO BASE ITS PRECLUSION ARGUMENTS ON FEDERAL LAW DURING THE ARIZONA PROCEEDINGS PRECLUDES IT FROM ASSERTING THEM AS A FEDERAL QUESTION TO THIS COURT

A. Under This Court's Jurisdictional Holdings And Rules, An Asserted Federal Question Must Have Been Raised, Argued, And Passed On As A Federal Question In The State Court Proceedings To Support Review By This Court.

Congress has given the Supreme Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had

. . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States. *See, e.g., Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam), citing 28 U.S.C. § 1257(a) (emphasis in original). "Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [the Supreme Court] has been asked to review.'" *Id.*, quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (omitting other citations). "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 497 (1981).

In order to effectuate this jurisdictional principle, Supreme Court Rule 14(1)(g)(i) states that a petition for a writ of certiorari must contain the following:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the *federal* questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the *federal* question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included. (Emphasis added).

Petitioner has not even attempted to, and cannot, satisfy these requirements, because it based its preclusion arguments below solely on Arizona law, with no reference to federal law or authorities. Indeed, Petitioner's sole acknowledgment of this jurisdictional requirement and Rule is contained in footnote 3 of the Petition, in which Petitioner studiously avoids using the word "federal" in describing the issue it argued in the Arizona proceedings. *See* Petition, p. 5 n.3.[2] In this passing reference to Rule 14(1)(g)(i), Petitioner wholly fails to comply with the obligations under that Rule to specify that *federal* questions were raised below (and where); to identify where in the record any *federal* questions were decided by the Arizona courts; and to quote or summarize any such discussion of the *federal* question in the state court record "so as to show that the *federal* question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The reason Petitioner avoided using the word "federal" is simple – it never argued res judicata or preclusion as a federal question, and the Arizona courts never addressed federal common law on those issues. Petitioner's Appendix E lists seven places in the record below where it made its preclusion arguments. *See* Petition, p. 5 n.3 and Appendix E. Respondents submit as Appendix 1 herewith the actual pages from the record below that are listed in Petitioner's Appendix E. Each of the seven record excerpts Petitioner identified demonstrate that its res judicata and preclusion arguments were based solely on Arizona law principles, not on federal law.[3] *See* Respondents' Appendix 1, which contains Petitioner's Appendix E, item 1 (in

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[2] Petitioner's footnote 3 states: "As required by this Court's Rule 14(g)(i) (sic), Appendix E (A-25) catalogues the occasions on which Dillard's asserted the preclusive effect of the Bankruptcy Court's judgment before the Arizona courts."

[3] This likely explains why Petitioner did not attach copies of these excerpt pages from the record below as part of its Appendix, despite the last sentence of Rule 14(1)(g)(i).

which Petitioner cites no legal authority, federal or otherwise, in support of its preclusion argument); item 2 (same); item 3, at p. App. 20 (Petitioner states that "[d]efensive collateral estoppel requires five elements *in Arizona* . . . ," [emphasis added] and cites three Arizona cases)[4]; item 4 (cites one Arizona case and no federal cases); item 5 (Petitioner cites, in its opening brief to the Arizona court of appeals, eight Arizona cases and no federal cases); item 6 (cites, in its reply brief to the Arizona court of appeals, three Arizona cases and no federal cases); and item 7 (cites, in its Petition for Review to the Arizona supreme court, three Arizona cases on this issue and no federal cases). It is of particular importance that Petitioner never cited to the Arizona courts any of the federal authorities on which it now relies – it never referenced this Court's decision in *Heiser v. Woodruff*, nor the federal circuit court decisions of *In re Medomak Canning*, *In re Fortier*, or *In re*

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[4] In Appendix E item 3, which was Petitioner's Motion for Reconsideration of the trial court's denial of its Motion for Summary Judgment, Petitioner discussed the Arizona case of *Garcia v. General Motors*, 195 Ariz. 510, 990 P.2d 1069 (App. 1999), and in that discussion referenced *Garcia's* quotation from a footnote in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979). However, this discussion involved the tangential issue of "offensive collateral estoppel," which Petitioner acknowledged was not at issue in this case. *See* Respondents' Appendix 1, reproducing Petitioner's Appendix E, item 3, at p. App. 18-19. Petitioner's only other reference to *Parklane Hosiery* in that brief was as additional support for the *Arizona* rules regarding collateral estoppel and privity. *Id.* at p. App. 21. At no point in its Motion for Reconsideration did Petitioner argue that the collateral estoppel issue was a federal question, and instead affirmatively based its position on the "five elements (required) in Arizona." Moreover, Petitioner had not cited or discussed *Parklane Hosiery* in its Motion for Summary Judgment or in its Reply, and more importantly, did not cite or discuss *Parklane Hosiery* in any of its briefs to the Arizona court of appeals or to the Arizona supreme court. And most tellingly, Petitioner did not cite *Parklane Hosiery* to this Court in support of its purported federal question or in support of any of its arguments. Finally, passing references to a tangential federal authority are not sufficient to "specially set up" a federal question. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 88-89 (1997); *New York Central R. Co. v. New York*, 186 U.S. 269, 272 (1902).

Dominelli – and it never referenced any of the federal statutes listed on page 2 of the Petition under "Constitutional Provisions and Statutes Involved."

Correspondingly, and not surprisingly, the Arizona court of appeals' memorandum decision contains no mention, discussion, or statement of federal common law, nor of any of the cases cited in the Petition. *See* Petitioner's Appendix A.

Where, as here, a petitioner does not argue an issue as a federal question in the lower proceedings, it is precluded from asserting it as a federal question as a basis for requesting a writ of certiorari. In *Webb*, *supra*, the petitioner sought review in this Court from a custody action in Georgia. 451 U.S. 493 (1981). The petitioner raised, as her federal question, the issue of whether the Federal Constitution required Georgia to give full faith and credit to a prior decision by a Florida state court. The focal issue for this Court was whether, pursuant to 28 U.S.C. § 1257 and Supreme Court Rule 21.1(h) – analogous in language to current Rule 14(1)(g)(i) – the petitioner had properly raised the federal issue before the Georgia courts. 451 U.S. at 495. The Court noted that (as here) the asserted federal question was not mentioned in the opinion of the Georgia supreme court nor expressly passed upon. *Id.* When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Id.* Although the petitioner used the phrase "full faith and credit" during the state court proceedings, "nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution." 451 U.S. at 496. Petitioner even argued that since the Georgia Constitution had no full faith and credit clause, her references to "full faith and credit" necessarily referred to the Federal Constitution. The Court rejected that suggestion and held that, in order to grant a writ of certiorari, there cannot be any doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and

that those courts were apprised of the nature of the federal claim. 451 U.S. at 501.

This Court also explained at length that its decision in *Webb* was in concert with strong policy considerations relating to the sovereignty of States, the principal of comity, and providing the parties with the opportunity to develop the record necessary for adjudicating the issue. 451 U.S. at 500-01. These policy considerations "strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts *only where the record clearly shows that the federal issue has been properly raised below*." 451 U.S. at 499 (emphasis added). For all these reasons, the Court concluded that it was without jurisdiction and, accordingly, denied the petition.

This same principle was recently echoed by this Court in *Howell v. Mississippi*, 543 U.S. 440, *supra*. In *Howell*, the petitioner sought review of a capital murder sentence, alleging that the state courts violated his Eighth and Fourteenth Amendment rights under the Federal Constitution in connection with the trial court's denial of a proposed jury instruction. 543 U.S. at 441. Referencing 28 U.S.C. § 1257(a), the Court found that petitioner's brief in the state supreme court did not properly present his claim as one arising under federal law, as it "did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." 543 U.S. at 443. In response to petitioner's claim that a federal question was raised, the Court stated:

> [a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'

543 U.S. at 444 (citations omitted); *see also Adams v. Robertson*, 520 U.S. at 89 (petitioner's "passing invocations of due process" that failed to cite any federal authority do

not meet the minimal requirement that it must be clear that a *federal* claim was presented); *New York Central R. Co. v. New York*, 186 U.S. 269, 273 (1902) ("[I]t is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not satisfied if "the purpose of the party to assert a Federal right is left to mere inference.").

Here, Petitioner specifically based its res judicata and preclusion arguments on Arizona law in the Arizona proceedings. Nowhere in the record, either in the portions cited by Petitioner or otherwise, did Petitioner base its position on federal common law res judicata or preclusion principles or on any of the cases cited in the Petition. Instead, Petitioner's citations and choice of law throughout the Arizona proceedings clearly demonstrate that Petitioner was relying solely on Arizona law. Now, for the first time, Petitioner wants to shift gears and present the issue as a question of federal law. Petitioner has waived this option. *See, e.g., Bollin v. Nebraska*, 176 U.S. 83, 91 (1900) (noting that the federal question must not be a mere "afterthought" and that if not properly raised in the state proceedings, "it is too late to raise the question [before the Supreme Court]").[5]

B. Petitioner Is Bound By Its Judicial Admissions That Arizona, Not Federal, Res Judicata And Preclusion Principles Are Controlling In This Matter.

Petitioner's arguments below that the principles of Arizona law, not federal law, govern the res judicata and

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[5] Indeed, if Petitioner believed it was federal common law that governed the res judicata and preclusion issues, it is difficult to reconcile why it would have told the Arizona courts to apply Arizona law.

preclusion issues (*e.g.*, the "five elements [required] in Arizona") constitute binding judicial admissions that preclude Petitioner from now arguing that federal common law applies. A judicial admission is defined as a formal concession in the pleadings or stipulations by a party or its counsel that are binding upon the party making them. *See, e.g., Soo Line R. Co. v. St. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997); *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). These statements, which cannot be contradicted on appeal, include any deliberate, clear, and unequivocal statement, either written or oral, made in the course of judicial proceedings. *McCaskill v. SCI Mgmt. Corp., et al.*, 298 F.3d 677, 680 (7th Cir. 2001) (citations omitted). Judicial admissions are "proof possessing the highest possible probative value." *Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983). In *Best Canvas*, the court had to determine the state in which the cause of action originated in order to determine which state's law applied. In its pleadings, Ploof had specifically alleged that the cause of action arose in Georgia. *Id.* On appeal, Ploof argued that the cause of action actually arose in Florida and that, therefore, the court should have applied Florida law. In rejecting Ploof's about-face, the court discussed the general principles of judicial admissions and held that Ploof's judicial admissions at the trial court level were sufficient reason to apply Georgia law. *Id.*

Here, Petitioner plainly, consistently, and unequivocally invoked Arizona law, not federal law, in support of its preclusion arguments below. These judicial admissions are binding on Petitioner and preclude it from now arguing the opposite.

C. Petitioner Is Judicially Estopped From Arguing That Federal Preclusion Principles Apply.

Petitioner's argument below that Arizona law was the proper choice of law to govern the res judicata and preclusion issues was unchallenged. Under the rule of judicial

estoppel, Petitioner is prohibited from changing its position now:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 749 (2001). Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.*, quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000). The doctrine of judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (citations omitted).

Petitioner's claim that federal res judicata law applies is clearly contradictory to its longstanding position in the Arizona courts that *Arizona* res judicata principles apply. This position was unchallenged, with the result that this issue was discussed and evaluated solely under Arizona law. Moreover, judicial acceptance of Petitioner's current, changed position (that federal law governs) would create "the perception that either the first or the second court was misled." *Pegram*, 530 U.S. at 750, quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982). For these reasons, the doctrine of judicial estoppel prohibits Petitioner from changing its argument in order to create a federal question for this Court.

II. THERE IS NO "IMPORTANT" FEDERAL QUESTION

Under Supreme Court Rules 10(b) and (c), the asserted federal question must be an "important" one to warrant review. Here, even if a federal question had been presented by the Arizona courts' resolution of Petitioner's

preclusion arguments, it would not be "important" for this Court to address it, for several reasons.

First, it is inconceivable that the Arizona court of appeals' memorandum decision will ever be found, let alone cited, in any litigation involving issues of federal common law res judicata and preclusion principles. This was an *unpublished* decision, it did not directly discuss res judicata or preclusion issues, and it certainly did not discuss federal common law or cite to any federal cases on the subject (including the federal cases Petitioner now cites). In fact, the *only* tangential reference to Petitioner's preclusion argument by the Arizona court of appeals is in footnote 3 of its memorandum decision:

> Because we find the trial court erred in its determination that Plaintiffs were third-party beneficiaries to the contract, we need not address Dillard's arguments that the trial court erred in granting better rights to Plaintiffs than were otherwise available to ETM under the transition agreement *or* that the trial court erred in its use of documents and arguments from the bankruptcy court proceeding.

Petitioner's Appendix A, at p. App. 9 n.3. This footnote does not even contain the words "federal," "res judicata," or "preclusion." Thus, the chance that any lawyer or court researching federal common law on these issues, whether by computer search or by perusing the digests, would even come across this decision are virtually nil. Even if found, there would be no reason to cite it, since it does not discuss these issues or make any statement one way or the other about federal law.

Second, by rule, unpublished memorandum decisions of the Arizona appellate courts are not to be cited or treated as precedent. Ariz. R. Civ. App. P. 28(c).[6] Thus,

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[6] Arizona Civil Appellate Rule 28(c) states: "Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case or (2) informing the appellate court of

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even if it was located in a legal research search, it would be improper for a party to cite this unpublished Arizona decision.[7]

Third, because unpublished opinions may be flatly disallowed or viewed merely as persuasive, such opinions do not create the "conflict" contemplated by Supreme Court Rule 10. *See, e.g., Alexander v. Davis*, 282 F. Supp. 2d 609, 611 (D. Mich. 2003) (holding that a plaintiff was incorrect in arguing that an unpublished decision created a conflict with published case law).[8]

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other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration or grant a petition for review. . . ."

[7] Unpublished opinions in most jurisdictions are attributed limited, if any, precedential value. *See, e.g.*, 9th Cir. R. 36-3 (2006) (the Circuit in which Arizona is located) (unpublished opinions are not precedent except when relevant under the "doctrine of the law of the case, res judicata, or collateral estoppel"); D.C. Cir. R. 36(c)(2) (2006) (allowing citation to unpublished cases in certain instances, but noting that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."); *see also Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001) (per curiam) ("The rule does not permit the citation of an unpublished disposition for the purpose of providing 'notice' to the court of the existence or absence of legal precedent . . . [Otherwise,] [i]t would permit an argument such as this: 'I am not citing this unpublished disposition as precedent, but only to inform the court of the fact that a prior panel held precisely what I would like the court to hold in my case'."). The recent amendment to Federal Rule of Appellate Procedure 32.1 allowing parties to cite to *federal* unpublished decisions does not apply here – first, the unpublished decision at issue here is from the state court, not a federal court, and second, the new rule applies only to federal decisions issued on or after January 1, 2007.

[8] *See also Curley v. Bryan*, 362 F. Supp. 48, 52 n.2 (D.S.D. 1973) ("But because memorandum decisions are not prepared with the assistance of the bar, we think it reasonable to refuse to treat them as precedent within the meaning of the rule of stare decisis. We prefer that they not be cited to us for an additional reason: since they are unpublished and generally unavailable to the bar, access to them is unequal and depends upon chance rather than research. For this reason, also, we will not ourselves in published opinions cite or refer to memorandum decisions. But although unmentioned, it should be clearly understood by the bench

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Fourth, Petitioner contends that the principles it espouses have been clearly set forth in decisions of this Court and of several circuit courts of appeals. As such, there is no apparent or "important" need to give parties or practitioners any further guidance on these issues, particularly in light of the lack of any contrary statements on these issues in the unpublished Arizona decision. This is not a case where an allegedly incorrect statement of federal law was made in a state court opinion and needs to be corrected.

Fifth, there is in any event no substantial conflict between federal common law and Arizona law regarding res judicata and preclusion principles. These doctrines require largely the same elements under both federal law and Arizona law.[9] Thus, regardless of whether federal law or Arizona law should have been applied, there is no "important" conflict to resolve, nor any "important" federal common law principle that needs to be defined or clarified.[10]

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and bar that any prior memorandum decision in conflict with a subsequently published opinion is to be considered overruled.")

[9] Under federal law, a final judgment on the merits of an action precludes the parties from relitigating claims that were raised or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). For a claim to be precluded, the following elements must be established: (1) a final judgment on the merits in an earlier action, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two suits. *See, e.g., Breneman v. United States, et al.*, 381 F.3d 33, 38 (1st Cir. 2004). Similarly, under Arizona law, a final judgment, rendered on the merits, is conclusive between the parties and their privies on every issue decided or that could have been decided. *Matusik v. Arizona Pub. Serv. Co.*, 141 Ariz. 1, 3, 684 P.2d 882, 884 (App. 1984). There must be (1) a final judgment on the merits; and (2) a common "identity of the parties, the capacity in which they appear, the subject matter, and the cause of action." *Id.*, quoting *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 222, 599 P.2d 175, 178 (1979), *cert. denied*, 445 U.S. 938 (1980).

[10] And if there were material differences, it would have been incumbent on Petitioner to urge the correct choice of law to the Arizona

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III. THE ALLEGED ERROR MERELY CONSTITUTES AT MOST THE MISAPPLICATION OF LAW, NOT A MISSTATEMENT OF FEDERAL LAW.

The last sentence of Supreme Court Rule 10 states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." By implication, the Court is interested primarily in addressing and resolving misstatements of federal law. Here, there can be no concern that the Arizona court of appeals' decision misstated any principle of federal law, because it did not state, or even mention, any such principles. Thus, there is no inaccurate statement of federal law here that needs to be corrected or defined. If anything, the Arizona courts accepted Petitioner's assertion regarding the applicability of Arizona's criteria for res judicata and preclusion, and are merely accused of misapplying the law. That kind of dispute does not warrant this Court's attention or review.

IV. THE DECISION OF THE ARIZONA COURTS IS NOT IN CONFLICT WITH THE RES JUDICATA AND PRECLUSION CASES PETITIONER CITES.

Dillard's argument that res judicata principles preclude the Arizona state court judgment below (the "Arizona Judgment") is wrong, because the claims asserted against Dillard's by the ETM bankruptcy estate's Chapter 7 Trustee (the "ETM Trustee") in the Bankruptcy Litigation[11] were separate and distinct from, adverse to, and mutually exclusive of the claims asserted against Dillard's

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courts. Having based its preclusion arguments on Arizona law, it could not now argue for the application of a materially different source of law.

[11] The adversary proceeding filed by the ETM Trustee against Dillard's, which resulted in the Bankruptcy Judgment underlying Dillard's res judicata claims.

by the Diamondbacks/Arena Parties in the Arizona Litigation.

In the Bankruptcy Litigation, the ETM Trustee unsuccessfully sought to force Dillard's to turn over to the ETM bankruptcy estate certain proceeds Dillard's had withheld that had been collected from sales of tickets to events put on by ETM's clients, including the Diamondbacks/Arena Parties (the "Ticket Proceeds"), so the Trustee could then distribute those monies *pro rata* among all of ETM's creditors. The ETM Trustee asserted several claims against Dillard's on behalf of the ETM bankruptcy estate, including avoidance and recovery of preferential transfers; breach of contract; turnover of estate property; breach of the covenant of good faith and fair dealing; accounting; and declaratory relief.[12] *See* Appendix 2 hereto. Dillard's responded by arguing, among other things, that the Ticket Proceeds did not belong to ETM because ETM was merely an agent, or conduit, on behalf of the ETM clients who actually put on the events that generated the Ticket Proceeds. The bankruptcy court ruled in favor of Dillard's and dismissed the ETM Trustee's claims.

By contrast, as affirmed by the Arizona court of appeals, the Arizona Judgment is not based on any of the causes of action asserted by the ETM Trustee, and instead is based solely on the Diamondbacks/Arena Parties' separate unjust enrichment claim against Dillard's. The Arizona court of appeals held that Dillard's was unjustly enriched when it absconded with the Ticket Proceeds, because the facts demonstrated that "Dillard's knew that most of this money belonged to ETM's clients," "knew that it did not own the tickets it was selling," and "was aware that it did not have an ownership interest in the ticket sale proceeds," and that "the actual monies withheld by Dillard's did not belong to Dillard's nor did the bulk of it belong to ETM." *See* Petitioner's Appendix E, at pp. App. 13-14, ¶¶31, 33. The court of appeals affirmed the Arizona

[12] The declaratory relief count requested an interpretation of the contract between ETM and Dillard's.

Judgment because " . . . Dillard's was unjustly enriched because it retained some monies that in equity belonged to clients of ETM." *Id.* at pp. App. 14-15, ¶35.

In ruling on the ETM Trustee's claims, the bankruptcy court made a narrow determination that the ETM bankruptcy estate had no right to the Ticket Proceeds. Accordingly, for a time, Dillard's kept its ill-gotten gains, because the ETM bankruptcy estate was not the party entitled to them. The Arizona courts later determined that the Ticket Proceeds belonged to the Diamondbacks/Arena Parties, and that Dillard's was unjustly enriched when it withheld them. No court *ever* found that Dillard's owned the Ticket Proceeds – indeed, Dillard's expressly argued in the Bankruptcy Litigation that ETM's clients did.

The two judgments are entirely consistent, and together clarify the priority of the parties' respective claims to the Ticket Proceeds. The Bankruptcy Judgment establishes only that as between the ETM bankruptcy estate and Dillard's, ETM did not have better rights in the Ticket Proceeds. The Arizona Judgment establishes that as between the Diamondbacks/Arena Parties and Dillard's, the Diamondbacks/Arena Parties have the better right to the Ticket Proceeds, because they own them. The determination of the Arizona courts is consistent with and not precluded by the Bankruptcy Litigation, which merely adjudicated different claims between different parties.

A. The Diamondbacks/Arena Parties' Individual Claims Against Dillard's Are Distinct And Different From The ETM Trustee's Claims Against Dillard's.

1. Dillard's Mischaracterizes The Proceedings In The Bankruptcy Court.

Dillard's arguments confuse the *effect* of both the Bankruptcy Litigation and the Arizona Litigation with the issues and claims decided therein. Dillard's argues that the Arizona Judgment is precluded because "the Bankruptcy Court had determined already that the Trustee

could not recover from Dillard's." Dillard's statement describes the effect of the Bankruptcy Judgment, but says nothing about the claims asserted or the issues decided therein. Res judicata analysis necessarily requires a comparison of the issues and claims adjudicated in the prior and subsequent litigation, rather than merely comparing the mechanical end effect of those adjudications. A comparison of the issues and claims asserted and adjudicated in the Bankruptcy Litigation and in the Arizona Litigation, respectively, demonstrates that the Bankruptcy Judgment did not preclude the Arizona Judgment.

In the Bankruptcy Litigation, the ETM Trustee alleged several causes of action, all based on contract or bankruptcy law, in an attempt to force Dillard's to turn over the Ticket Proceeds it had withheld. Dillard's responsive pleadings and arguments denied that ETM or its estate held any right to or ownership interest in the Ticket Proceeds, but never contended that Dillard's itself owned the Ticket Proceeds.

As a court of limited jurisdiction, the bankruptcy court decided the bankruptcy issues presented to it,[13] ruling that the ETM bankruptcy estate did not have a right to or interest in the Ticket Proceeds. The result (which Dillard's mischaracterizes as the issue decided): the ETM Trustee could not recover from Dillard's. The bankruptcy court never determined – and it was never asked to determine – the respective rights of *non-debtor* parties in or to the Ticket Proceeds.[14]

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[13] Which included state law contract issues only as they related to ETM and its bankruptcy estate.

[14] Bankruptcy courts generally do not have jurisdiction over, let alone an interest in deciding, disputes between non-debtor parties concerning non-estate property. *See, e.g., In re Xonics*, 61 B.R. 818 (N.D. Ill. 1986); *In re Southern Industrial Banking Corp.*, 63 B.R. 331, 335 (E.D. Tenn. 1986); *In re Merritt Yochum*, 89 F.3d 661, 669-70 (9th Cir. 1996). Thus, the bankruptcy court here would not have had jurisdiction or motivation to decide which of two non-debtor entities like Dillard's

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The Diamondbacks/Arena Parties were neither party nor privy to the Bankruptcy Litigation, and their claim to the Ticket Proceeds (based on unjust enrichment) was never at issue in the bankruptcy case. Dillard's did, however, strenuously argue in the Bankruptcy Litigation, in direct contradiction to its position here, that the Ticket Proceeds were never ETM's property because they were instead the property of ETM's clients, including the Diamondbacks/Arena Parties.[15] Dillard's was clear and unequivocal:

> Dillard's counsel: So . . . and on top of all that, there's a question as to whether or not the evidence would support that these are even their funds because they operated as a conduit, they operated as an agent. **These were not their [ETM's] funds.**
>
> * * *
>
> THE COURT: When you say it's not – wasn't property of the estate or it wasn't the debtor's property, the debtor – the money would go from your client to the debtor and then the debtor would remit net of its fees, right?
>
> Dillard's counsel: That's correct.
>
> THE COURT: So why do you say it wasn't the debtor's funds?
>
> Dillard's counsel: **Your Honor, the evidence was that the – this was other people's money.**
>
> * * *

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and the Diamondbacks/Arena Parties had better rights in an asset (the Ticket Proceeds) that was not property of the bankruptcy estate.

[15] *See* "Dillard's, Inc.'s And Dillard Store Services, Inc.'s Response In Opposition To Trustee James J. Joseph's Motion For Summary Judgment Or In The Alternative Summary Adjudication Of Issues Regarding Trustee's First And Second Claims For Relief," at p. 8, §B, attached hereto as Appendix 3.

> THE COURT: Yeah, but what about the debtor's right to remit net of the debtor's fees?
>
> Dillard's counsel: The debtor held that purely – the debtor, I think, breached its obligations to its sports venues. As between it, there is no evidence of entitlement as between it and its venues as to fees.
>
> * * *
>
> THE COURT: So you're saying that the only money that your client kept by way of the recoupment was the fee that the debtor was entitled to take. Is that what you're saying?
>
> Dillard's counsel: No, I'm saying the only money my client kept is what we were owed, nothing more.[16]

Dillard's successfully escaped the ETM Trustee's claims in the Bankruptcy Litigation utilizing these assertions and arguments, in part because the ETM Trustee could not refute what it had already acknowledged in its complaint; that it was but a conduit for the Ticket Proceeds that belonged to its clients.[17]

The bankruptcy court's ruling in favor of Dillard's is in fact a narrow determination that the ETM Trustee was not entitled to relief. Dillard's was granted no affirmative relief. There was certainly no adjudication or even consideration of the unjust enrichment claim separately asserted by the Diamondbacks/Arena Parties in the Arizona Litigation. "The preclusive effect of a bankruptcy decree must reflect the reality of its limited jurisdiction." *Latham v. Wells Fargo Bank*, 896 F.2d 979, 983 (5th Cir. 1990) (holding that "the claims held by the court below to be precluded could not have been entertained by the bankruptcy court. . . . [the creditor's] personal claims are not

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[16] Transcript of bankruptcy court oral argument on cross-motions for summary judgment, April 30, 2002 (emphasis added), excerpt pages attached hereto as Appendix 4.

[17] ETM's Bankruptcy Litigation Complaint, ¶27, cover page listing causes of action (Appendix 2 hereto).

barred, and we must reverse the order dismissing them and remand this case to the district court to allow them to proceed."). In this case, the jurisdiction of the bankruptcy court was properly exercised and properly limited. Because ETM had no right to or ownership interest in its clients' Ticket Proceeds, it could not recover them from Dillard's.

2. Dillard's Ignores The Separate Basis For The Arizona Judgment.

In the Arizona Litigation, the Diamondbacks/Arena Parties asserted claims against Dillard's based on the fact that the Ticket Proceeds Dillard's misappropriated were their property. The only issue that overlapped with those decided in the Bankruptcy Litigation was whether the "no offset" provision in the transition contract between Dillard's and ETM provided an additional basis for the Diamondbacks/Arena Parties to recover from Dillard's. Any question about the preclusive effect of the Bankruptcy Judgment on this issue was mooted when the Arizona court of appeals reversed the trial court's determination that the Diamondbacks/Arena Parties could enforce that contract as third party beneficiaries, and instead affirmed the Arizona Judgment solely on the separate, non-contractual claim of unjust enrichment.[18] "We have found that no contract defined the relationship between Dillard's and Plaintiffs. We have instead affirmed the award on the basis of unjust enrichment." *See* Petitioner's Appendix A, at p. App. 16 ¶39.

The Arizona court of appeals' decision explained that Dillard's was unjustly enriched based on the same facts Dillard's had admitted and argued in the Bankruptcy

[18] The Arizona court of appeals rejected the third party beneficiary contract claim based solely on its determination that the Diamondbacks/Arena Parties did not satisfy the requirements for third party beneficiary status, *not* based on the Bankruptcy Judgment or on any res judicata or preclusion argument. *See* Petitioner's Appendix A, at pp. App. 7-9, ¶¶17-23.

Litigation. "Here, the trial court determined 'Dillard's knew that most of this money belonged to ETM's clients.' There is adequate evidence in the record to support that finding. . . . Thus, Dillard's was aware that it did not have an ownership interest in the ticket sale proceeds." *Id.* at pp. App. 13-14, ¶¶31, 33.

In summary, the claims of each of the Diamondbacks/Arena Parties, the ETM Trustee, and Dillard's, are adverse to and mutually exclusive of each of the others. Each claimed sole and exclusive rights to the Ticket Proceeds.[19] Where the bankruptcy court decided only that the ETM bankruptcy estate had no right to recover the Ticket Proceeds from Dillard's, the Arizona court later decided that the Diamondbacks/Arena Parties did have such a right. The first determination did not preclude the second.

B. The Diamondbacks/Arena Parties Were Not In Privity With The ETM Trustee Regarding Their Individual Claims.

Courts articulate the elements of res judicata in various but functionally similar terms: "[R]es judicata requires: '(1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit on the same cause of action." *Fidelity Nat'l Title Ins. Co. of New York v. Bozzuto, et al.*, 227 B.R. 466, 472 (E.D. Va. 1998); *see also Hoxworth v. Blinder, et al.*, 74 F.3d 205, 208 (10th Cir. 1996); *In re Sovereign Partners*, 1997 U.S. App. LEXIS 6598, at *13

[19] The ETM Trustee never asserted his claim to exclusive possession of the Ticket Proceeds directly against the Diamondbacks/Arena Parties in either the Bankruptcy Litigation or the Arizona Litigation, because they were never both parties in the same litigation. However, the ETM Trustee's unsuccessful claim that the Ticket Proceeds were estate property clearly positions the ETM Trustee adversely to any other claim of ownership, including the Diamondbacks/Arena Parties' claim.

(9th Cir. 1997); *In re Marlar*, 267 F.3d 749, 754 (8th Cir. 2001); *Amaro v. The Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984). Dillard's incorrectly argues that the Diamondbacks/Arena Parties were in privity with the ETM Trustee, and that the claims they asserted in the Arizona Litigation involved the same cause of action that was at issue in the Bankruptcy Litigation.

Dillard's argument is based on the overbroad and oversimplified assertion that various courts "have held that unsecured creditors are in privity with a bankruptcy trustee and are thus precluded from pursuing litigation following the trustee's settlement of claims against the same defendant." Petition, p. 10. The analytical gaps in Dillard's assertion highlight the flaws in its argument. Dillard's does not acknowledge the importance of the nature, relationship, and relative similarity of or differences between the causes of action and issues in the two separate proceedings. It is the nature and relationship of parties and claims in prior litigation to those in subsequent litigation that determines whether res judicata principles apply.

Dillard's relies heavily on *Heiser v. Woodruff*, 327 U.S. 726 (1946), yet fails to mention that *Heiser* found privity between a debtor and his trustee only where first the debtor, then the trustee, then both of them jointly, attempted to litigate precisely the same issue – whether a certain creditor's judgment had been obtained by fraud. *See* 327 U.S. at 734-35. In *Heiser*, the debtor had unsuccessfully challenged the judgment before the bankruptcy petition was filed. Later, the bankruptcy court authorized the trustee to go back to the district court to challenge the judgment again – which it did, but unsuccessfully – on the very same basis. When the trustee and the debtor then jointly raised yet a third challenge to the judgment, by objecting to the judgment creditor's claim in the bankruptcy proceedings, the Supreme Court held that res judicata precluded this third attempt.

> There was no equitable ground upon which his claim or the judgment upon it could be set aside or subordinated to those of other creditors in the

> bankruptcy proceeding, except that asserted by respondents that the judgment had been procured by a fraud perpetrated on the judgment debtor. That issue, having been twice litigated and decided in the court in which the judgment was rendered, in proceedings brought by the trustee in bankruptcy and the bankrupt, and by the bankrupt alone, may not now be relitigated in the bankruptcy court.

327 U.S. at 739-40. Not only are the facts of *Heiser* inapposite to the present case, so is its true holding. The *Heiser* opinion largely stands merely for the proposition that bankruptcy courts, even though courts of equity, are not exempt from adhering to the principle of res judicata. 327 U.S. at 738.

Dillard's attempts to glean support from *Heiser* by quoting its language that res judicata binds a "trustee, the bankrupt, and those who claim under them. . . . " 327 U.S. at 736. However, Dillard's misses the critical point; the Diamondbacks/Arena Parties did not "claim under" the ETM Trustee with respect to their individual unjust enrichment claim in the Arizona Litigation. Dillard's fails to note that as a member of the class of unsecured creditors in the ETM Chapter 7 case, the Diamondbacks/Arena Parties were in privity with the ETM Trustee *only* with regard to the ETM estate's claims against Dillard's. *See In re Dominelli*, 820 F.2d 313, 317 (9th Cir. 1987) (finding privity where "the trustee represented the estate in the first action [and] Lawrence seeks to represent the estate in this action, . . . the same primary right is involved . . . the estate's right to assert the usury defense which derives from the debtor's right to have done so before bankruptcy.")[20] Because the Bankruptcy Judgment merely

[20] However, as more fully explained below, even *In re Dominelli* acknowledges the distinction between a creditor's rights as a member of a larger creditor class represented by the trustee, as compared with the creditor's individual rights. 820 F.2d at 317. Such a distinction negates a claim of privity.

established that the ETM bankruptcy estate had no interest in or right to the Ticket Proceeds, the Bankruptcy Judgment could not preclude the Diamondbacks/Arena Parties from pursuing their own separate, independent right to the Ticket Proceeds under their unjust enrichment cause of action.

The Arizona Litigation adjudicated the Diamondbacks/Arena Parties' individual claims against Dillard's, claims that were never ETM's to assert. The cases Dillard's cites in support of its privity arguments all involve creditors raising *the very same issues* or asserting *the very same claims* that were previously litigated, and most importantly, claims that were bankruptcy estate property. *See Heiser,* 327 U.S. at 736 (denying relitigation of claim that one creditor's judgment, which diluted the claims pool, was obtained by fraud, where that "issue was decided against the trustee, the bankrupt and those whom they represent or who claim under them. . . ."); *In re Medomak Canning,* 922 F.2d 895, 902 (1st Cir. 1990) (barring a creditor's action to equitably subordinate another creditor's claim after the bankruptcy trustee settled that same claim, noting that "an unsecured creditor may assert equitable subordination only where the Trustee has refused to do so. . . ."); *In re Dominelli,* 820 F.2d at 317 (finding privity where "the same primary right is involved in the trustee's action and in Lawrence's action: *the estate's right* to assert the usury defense. . . .") (emphasis added); *In re Fortier,* 161 Fed. Appx. 514, 516 (Bankr. 6th Cir. 2005) (trustee was precluded from relitigating disposition of funds on behalf of constituent creditor where trustee had negotiated and agreed to disposition).

Creditors of a class that is the beneficiary of claims asserted by a bankruptcy trustee often simultaneously hold individual claims that a trustee has no standing to assert. Cases involving that situation, which is the situation here, consistently explain that there is no privity between the creditor and trustee as to those individual claims, and as a result, the resolution of the trustee's claims does not preclude assertion of the creditor's individual claims.

> [P]rivity exists for purposes of res judicata where two parties represent the interests of the same entity, and this relationship may exist between a creditor and a trustee *in some cases*. . . . In deciding whether the creditor and the trustee are in privity in this case, it should be remembered that the trustee here, and generally, is acting on behalf of all creditors equally, and not on behalf of any individual creditor. The creditor Massey, on the other hand, in his suit for denial of discharge, was acting mainly if not completely in his individual capacity, as is evidenced by his request for a judgment awarding him the amounts owed him by the debtor Davidson. *It therefore does not appear that the interests of the same parties were being represented in the creditor's suit and the trustee's suit.*

Hudgins v. Davidson, 127 B.R. 6, 8 (E.D. Va. 1991) (internal citations omitted) (emphasis added) (reversing dismissal of claim "even if the trustee were attempting to bring his claim based on the same factual allegations made by creditor Massey in his prior claim.").

> With respect to the second requirement, Dunn contends that the bankruptcy trustee and a creditor are the same entity for res judicata purposes. This contention is overbroad. Certainly any claims that belong to the debtor, and hence could have been brought by the Trustee, were released when the Trustee signed the general release with Dunn. Thus, count I, the alter ego claim, would be barred by res judicata. But that principle is not applicable with respect to Counts III and IV, as neither of these counts assert claims that might have been brought by the Trustee. Thus, with respect to these claims, the Trustee cannot be equated with Fidelity or be considered 'in privity' with Fidelity. Put another way, the Trustee and Fidelity cannot be considered 'privies' with respect to Counts III and IV because these claims belong independently to Fidelity

> and the Trustee had no power to assert Fidelity's independent claims.

Bozzuto, 227 B.R. at 472-73.

Here, as in *Hudgins*, the Diamondbacks/Arena Parties have individual claims against Dillard's that are related to some of the same facts that gave rise to the claims asserted by the ETM Trustee in the Bankruptcy Litigation. Just as in *Bozzuto*, Dillard's makes the overbroad argument that the Diamondbacks/Arena Parties and the ETM Trustee should be considered one and the same for res judicata purposes. *Hudgins* makes clear that a similar factual scenario does not preclude litigation of separate, individual claims. *Bozzuto* makes it equally clear that where the Diamondbacks/Arena Parties have separate, individual claims, earlier litigation of a bankruptcy trustee's separate claims has no preclusive effect. Here, there is no privity between the Diamondbacks/Arena Parties and the ETM Trustee on the unjust enrichment claim adjudicated in the Arizona Litigation, because that cause of action was the Diamondbacks/Arena Parties' individual claim.

Not only were the Diamondbacks/Arena Parties' claims independent of those asserted by the ETM Trustee in the Bankruptcy Litigation, they were adverse to and mutually exclusive of the claims the ETM Trustee had unsuccessfully pursued. Again, Dillard's own authorities demonstrate that based on the clearly adverse and mutually exclusive nature of the Diamondbacks/Arena Parties' and the ETM Trustee's interests and claims, they are not in privity in this case:

> As a judgment creditor of Meyer Blinder, the Hoxworth Class was in direct opposition with the trustee. Every dollar of Meyer Blinder's assets the Hoxworth Class reached by imposition of its secured lien would leave one dollar less in the Blinder Robinson estate for the trustee to satisfy creditors. . . . The parties' polar objectives lead us to conclude the trustee represented the Hoxworth Class only as creditors to the Blinder Robinson estate. No privity of interest extended from

> the trustee to the Hoxworth Class as judgment creditors of Meyer Blinder.

Hoxworth, 74 F.3d at 208. *See also In re Medomak Canning*, 922 F.2d at 902 ("For purposes of determining the applicability of res judicata here, identity of interests is equivalent to privity."). In this case, the Diamondbacks/Arena Parties stand in a position similar to that of the *Hoxworth* creditors; the Diamondbacks/Arena Parties successfully pursued their own interest in recovering 100% of their withheld Ticket Proceeds, an interest at odds with the ETM Trustee's unsuccessful attempt to recover those same dollars to divide on a *pro rata* basis among all of ETM's general unsecured creditors. The "polar objectives" of the Diamondbacks/Arena Parties and the ETM Trustee make it clear they are not in privity, just as the creditors and trustee in *Hoxworth* were not.

In short, Dillard's res judicata argument ignores the reasoning of the cases it cites and the elements of the legal principle it advances, and ignores the fact that there was no adjudication of the Diamondbacks/Arena Parties' unjust enrichment claim in the Bankruptcy Litigation, which is their own separate and independent claim that the ETM Trustee did not hold or assert.

C. Dillard's Is Barred By The Doctrine Of Judicial Estoppel From Arguing That The Ticket Proceeds Are Its Own.

Dillard's prevailed against the ETM Trustee by arguing that the Ticket Proceeds were not ETM bankruptcy estate property because they belonged to ETM's clients such as the Diamondbacks/Arena Parties. Under the doctrine of judicial estoppel, Dillard's is bound by this argument and this result, and cannot change its position here:

> Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. Judicial estoppel should be invoked not only

> to prevent a party from gaining an advantage by taking inconsistent positions, but also because of "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." . . . The United States Supreme Court recently listed three factors that courts may consider in determining whether to apply the doctrine of judicial estoppel: . . . First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Hamilton v. State Farm Fire And Casualty Co., 270 F.3d 778, 782-83 (9th Cir. 2001) (internal citations omitted). In the Bankruptcy Litigation, Dillard's argued, successfully, that the Ticket Proceeds belonged not to ETM, but to ETM's clients, including the Diamondbacks/Arena Parties. Now, Dillard's does an about face and argues that the Ticket Proceeds are its money. Moreover, Dillard's would derive an unfair advantage from arguing in the Bankruptcy Litigation that the Ticket Proceeds belong to ETM's clients and thus not to ETM, then arguing to the contrary in this Court. Judicial estoppel precludes Dillard's from arguing that it owns the Ticket Proceeds as against ETM clients like the Diamondbacks/Arena Parties.

CONCLUSION

For the reasons herein, the Petition should be denied. Additionally, because it is so clear under this Court's case-law and Rules that an asserted federal question must have been "specially set up" in the state court proceedings and passed on by the state court, and because it is so clear that Dillard's not only did not argue res judicata and preclusion as a federal question below but affirmatively argued it as a question of Arizona state law, and because it is so clear that the Arizona courts did not consider or address any federal question, Respondents ask this Court to find that the Petition is frivolous under Supreme Court Rule 42(2) and award Respondents their costs plus damages in the nature of the attorneys' fees they have incurred in responding to the Petition.

Respectfully submitted,

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APPENDIX 1

Petitioner's Appendix E, together with copies of the lower court record excerpts referenced in Petitioner's Appendix E.

[PETITIONER'S] APPENDIX E

Superior Court of Maricopa County

1. Defendant Dillard's, Inc.'s Motion for Summary Judgment and Accompanying Memorandum, page 8.
2. Defendant Dillard's, Inc.'s Post-Trial Brief – Liability, page 10.
3. Dillard's, Inc.'s Motion for Reconsideration, pages 2, 8-14.
4. Defendant Dillard's Supplement To Motion For Reconsideration, pages 3-13.

Court of Appeals of the State of Arizona

5. Opening Brief of Defendant-Appellant Dillard's, Inc., pages 39-44.
6. Reply Brief of Defendant-Appellant Dillard's, Inc., pages 7-13, 15-22.
7. Defendant-Appellant Dillard's, Inc.'s Petition for Review [by the Supreme Court of Arizona], pages 5, 8-10.

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IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AZPB LIMITED PARTNERSHIP dba ARIZONA DIAMONDBACKS; PHOENIX SUNS LIMITED PARTNERSHIP dba PHOENIX SUNS; and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs, vs. DILLARD'S, INC., a Delaware corporation, fka Dillard Department Stores, Inc.; JOHN DOE, Defendants.	No. CV2000-012428 DEFENDANT DILLARD'S, INC.'S MOTION FOR SUMMARY JUDGMENT AND ACCOMPANYING MEMORANDUM (Assigned to the Hon. Michael J. O'Melia) (Oral Argument Requested)

I. FACTUAL BACKGROUND

A. General Background

In 1993, Defendant Dillard's, Inc. ("Dillard's") created a subsidiary corporation known as Dillard Ticketing Systems, Inc. ("DTS") to operate the business of Dillard's

ticket sales. Complaint, ¶ 7. DTS contracted with Plaintiffs to sell tickets to various sports and entertainment events hosted by Plaintiffs. Complaint, ¶¶ 7-10.

* * *

[8] under the contract" *citing* 17A Am.Jur.2d Contracts, § 459.) Thus, a third party beneficiary may only enforce his/her rights under a contract to the same extent as if he/she had personally entered into and assented to the agreement. *Suciu v. AMFAC Distrib. Corp.*, 138 Ariz. 514, 519, *cited* in *Flagstaff Medical Center, Inc.*, 773 F. Supp. at 1359 (D. Ariz. 1991).

Here, a court with competent jurisdiction over both DTS/ETM and Dillard's analyzed the rights and remedies between those two parties under the Transition Agreement and determined that Dillard's had not breached the Transition Agreement. Plaintiffs do not have rights under the Transition Agreement better than DTS/ETM and, thus, are precluded from recovering under a breach of contract theory, even if they are third party beneficiaries.

B. Dillard's has not Converted Plaintiffs' Property

Conversion is an intentional tort, the essence of which is the wrongful deprivation of property from its rightful owner. *United Bonding Ins. Co. v. Swartz*, 12 Ariz. App. 197, 199 (1970). In the words of the RESTATEMENT OF TORTS (SECOND), conversion is the intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. *Focal Point, Inc. v. U-Haul C. of Arizona,*

Inc., 155 Ariz. 318, 319 (App. 1986) *citing* RESTATEMENT OF TORTS (SECOND) at § 222(A)(1).

A conversion action can only succeed to the extent that the purported owner of the funds can identify a specific, distinct chattel. For example, in *Cassell v. General Motors Corp.*, 154 Ariz. 75, 77 (App. 1987), a contract called for the delivery of a 1985 Cadillac Eldorado, which GMC did not deliver, but no specific 1985 Cadillac Eldorado had ever been

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IN THE SUPERIOR COURT OF
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AZPB LIMITED PARTNERSHIP dba ARIZONA DIAMONDBACKS; and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs, vs. DILLARD'S, INC., a Delaware corporation, fka Dillard Department Stores, Inc.; JOHN DOE, Defendants.	No. CV2000-012428 **DEFENDANT DILLARD'S, INC.'S POST-TRIAL BRIEF – LIABILITY** (Assigned to the Hon. Michael J. O'Melia)

I. Plaintiffs are not Intended Third Party Beneficiaries and do not have Standing to Bring this action

A. Applicable Intended Third Party Beneficiary Law

1. Arizona's Black Letter Law

The Arizona Supreme Court has issued three decisions which collectively set out the black letter law of

intended third party beneficiaries in Arizona. The last summarized the law:

> The Arizona rule is that in order for a person to recover as a third-party beneficiary of a contract, an intention to benefit that party must be indicated in the contract itself, *Irwin v. Murphey*, 81 Ariz. 148, 302 P.2d 534 (1956); *Basurto v. Utah Construction and Mining Co.*, 15 Ariz. App. 35, 485 P.2d 859 (1971). The contemplated benefit must be both intentional and direct, *Irwin, supra*, *Treadway v. Western Cotton Oil, Etc. Co.*, 40 Ariz. 125, 10 P.2d 371 (1932), and "it must definitely appear that the parties intend to recognize the third party as the primary party in interest," *Irwin, supra*, at 154, 302 P.2d at 538.

Norton v. First Federal Savings, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981).

* * *

[10] Here, a court with competent jurisdiction over both ETM/DTS and Dillard's analyzed the rights and remedies between those two parties under the Transition Agreement and determined that Dillard's had not breached the Transition Agreement. Plaintiffs do not have rights under the Transition Agreement better than ETM/DTS and, thus, are precluded *as a matter of law* from recovering under a breach of contract theory, even if they are third party beneficiaries.

B. ETM Breached the Transition Agreement by Failing to Pay Dillard's and Accepting Performance from Dillard's Even Though it Knew it Could Not Pay for Dillard's Services

1. ETM's Non-Payments were More than Just Late

LaPerle testified that by the end of May 2000 he knew that ETM/DTS would not be able to pay Dillard's for the unpaid invoice for services accruing since March 2000. Tr. at 85. On June 16, 2000, ETM/DTS entered into an agreement to transfer its assets to Ticketmaster. In the recitals, ETM/DTS acknowledged that it had "advised Ticketmaster on or about June 10, 2000 that [ETM/DTS] were out of cash and planning to close their doors and cease all operations as of June 15, 2000." Tr. Exh. 3, 5th Whereas recital. ETM *knew that it could not and would not* have funds to pay Dillard's for work performed. By then, at the latest, ETM's "late payments" turned into knowing non-payments, because ETM/DTS had no ability whatsoever, at any time, to pay the invoices. It publicly repudiated the Transition Agreement.

In essence, Plaintiffs contend that the missing payments should be considered as "late," even as of today, because Plaintiffs contend ETM/DTS never actually *told Dillard's* that it had repudiated the contract and the payments would not be coming, even though ETM/DTS knew that to be the case. LaPerle testified that, to his knowledge, even a payment that was six months late was "still a late payment." Tr. at 40. Indeed, he further testified that there was no limit on how late a payment could be – even a payment that was 2-3 years late would still be just "late." *Id.* at 40-41. But that testimony is nonsensical here,

where ETM/DTS admitted to a third party that it could not make any of the payments.

* * *

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AZPB LIMITED PARTNERSHIP dba ARIZONA DIAMONDBACKS; and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs, vs. DILLARD'S, INC., a Delaware corporation, fka Dillard Department Stores, Inc.; JOHN DOE, Defendants.	Civil Action No. CV2000-012428 **DILLARD'S, INC.'S MOTION FOR RECONSIDERATION** (Assigned to the Hon. Michael J. O'Melia)

Defendants, Dillard's, Inc. ("Dillard's") moves this Court to reconsider its Minute Entry dated May 16, 2003 and filed on May 20, 2003, granting relief to Plaintiffs on their breach of contract claim. Dillard's raises three reasons in support of this motion.

First, with all due respect, Dillard's submits that the Court erred when it determined that "The Motion for

Summary Judgment filed in the Bankruptcy Court seemed to be for breach of contract and did not specify paragraph 2.1" of the Transition Agreement. To the contrary, the *only* issue litigated in the Trustee's breach of contract claim was the meaning and interpretation of Section 2.1 of the Transition Agreement.

Second, the Court noted: "If this Court is bound by the Bankruptcy Court's rulings, obviously this ruling is wrong." Dillard's respectfully suggests that the Court should [2] have determined whether ETM/DTS, the contracting parties through whom Plaintiffs claimed a right to recovery here, were bound by the decision, rather than determining whether the *Court* was bound. If ETM/DTS were bound, then Plaintiffs as third party beneficiaries also were bound under fundamental rules of third party beneficiary law in Arizona.

Third, Plaintiffs argued to this court throughout this matter, including in their summary judgment and post trial briefs, that the Bankruptcy Court judgment was "irrelevant" because Plaintiffs had no notice of the adversary proceeding, that they were not "consulted or even apprised" about the adversary proceedings in the Bankruptcy Court and that they had no opportunity to litigate the bankruptcy summary judgment motions. But Plaintiffs' recently filed Attorneys' Fee Application shows that Plaintiffs knew about the adversary proceedings, including the summary judgment motions, as they occurred, considered (but decided against) intervening in the summary judgment proceedings, and assisted the Trustee from the sidelines, so to speak, in his preparation for oral argument on the Motions for Summary Judgment. Contrary to arguments Plaintiffs made to the Court, Plaintiffs *were* in privity with the Trustee and, thus, should be bound by the

decisions, apart from and in addition to the binding effect on the Plaintiffs as third party beneficiaries, under doctrines of *res judicata* or defensive collateral estoppel.

This Motion is supported by the following Memorandum of Points and Authorities in Support, the court's record and good cause.

RESPECTFULLY SUBMITTED, this 21st day of July, 2003.

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* * *

[8] party beneficiary analysis, and it does not render the third party beneficiary analysis "irrelevant" as suggested by Plaintiffs. On appeal of the Court's ruling as it presently stands, one of the likely issues for consideration for the Court of Appeals will be "Is a judgment that interprets a contractual provision for the promisee of a contract "irrelevant" when determining the rights and remedies of a purported third party beneficiary claiming through said promisee and through the provision at issue?" The answer to that question assuredly must be "no" as a matter of law; yet the decision rendered by this Court, with all due respect, suggests that the answer to that question should be "yes."

C. Dillard's Requests that the Court Re-examine its Conclusion that the Court is not Bound by the Bankruptcy Court's Judgment

The Court noted in its Minute Entry that its ruling "obviously" would be "incorrect" if the "Court is bound by the Bankruptcy Court rulings." Dillard's respectfully suggests that the appropriate inquiry should not have been whether *this Court* was bound by the Bankruptcy Court's decision, but whether *ETM/DTS*, the parties through whom Plaintiffs claim rights as third party beneficiaries, were bound by the Bankruptcy Court's decision. If ETM/DTS were bound, which they indisputably were, and Plaintiffs claim rights as third party beneficiaries through ETM/DTS under the very provision that the Bankruptcy Court interpreted, then Plaintiffs are bound, too, as a matter of law, regardless of whether this Court, per se, is bound by comity or other doctrine to agree with the Bankruptcy Court.

The Court's decision results in the anomalous result that the Plaintiffs, even if purported third party, beneficiaries of ETM/DTS, actually received better and greater rights and remedies than ETM/DTS had as a result of the Bankruptcy Court decisions. While ETM/DTS were legally barred from recovering funds from Dillard's pursuant to Section 2.1, this Court's decision allowed Plaintiffs' recovery under Section 2.1. Although Plaintiffs convinced the Court that they were third party beneficiaries to at least some provisions of the Transition Agreement, they never even addressed how they could get around the second prong of the analysis – that is, how they could have better rights than the party through whom [9] they claimed. On appeal, another issue to be considered will be: "May a purported third party beneficiary have better and greater

rights than the promisee through whom it claims rights as a third party beneficiary?" The answer will have to be, under Arizona law, "No." Yet the court resolved this question with a "Yes."

II. Plaintiffs Knew About and Participated in, from Behind the Scenes, the Summary Judgment Motions in the Bankruptcy Proceedings, and Dillard's Requests that the Court Revisit the Issues of Collateral Estoppel and *Res judicata*

In support of their argument that they were not bound by principles of *res judicata* or collateral estoppel, Plaintiffs told the Court, among other things, that they "had no notice of this adversary proceeding, and certainly did not have an opportunity to litigate any of the issues presented. . . . Plaintiffs have not had a prior opportunity to litigate the breach of contract issue, nor were Plaintiffs involved at all in the prior adversary proceeding in Bankruptcy Court." Plaintiffs' Response to Defendant's Motion for Summary Judgment at 8-9. In another brief, Plaintiffs represented that they "were not a party to the adversary proceeding, and they were not even informed that Dillard's motion existed until days before it was ruled on, when Dillard's finally disclosed it in this case." Plaintiffs' Reply in Support of Motion for Partial Summary Judgment at 4. Finally in their Post Trial Closing Brief Plaintiffs represented to the Court: "Here, Plaintiffs have no idea how diligently the bankruptcy trustee pursued its claims (since we were not consulted or even kept apprised). . . ." Plaintiffs' Post Trial Closing Brief at 31, fn. 11.

As Dillard's learned in reviewing Plaintiffs' Application for Attorneys' Fees, Plaintiffs' counsel billed extensively to monitor and, at times, to participate behind the

scenes in the bankruptcy proceedings. *See* Exhibit A. Mr. Cotterman, a partner at Gallagher & Kennedy, contemporaneously knew about the adversary proceeding, knew about the summary judgment proceedings, considered whether Plaintiffs should intervene or otherwise join the summary judgment proceedings, decided not to intervene, helped the Bankruptcy Trustee prepare for the hearing before the Bankruptcy Court on Dillard's Motion for [10] Summary Judgment, and discussed how the hearing went with counsel for the Trustee after the fact. *See generally* Exhibit A.

For example, in his entry of February 1, 2002, Mr. Cotterman recorded that he reviewed what claims, if any, Plaintiffs could bring against Dillard's in the Bankruptcy Court, and researched whether Plaintiffs should intervene in the Bankruptcy Action in general, and the summary judgment proceedings in particular. *Id.* Through early February 2002, Mr. Cotterman coordinated and worked with the bankruptcy Trustee to see how Plaintiffs might be able to help the Trustee in its dispute with Dillard's in the adversary proceedings. For example, Mr. Cotterman's entry for February 6, 2002 shows the following description: "Work with Bankruptcy Trustee Counsel re Claims against Dillard's, Intervention in Bankruptcy and Summary Judgment issues." *Id.* His entry for February 11, 2002, stated: "Begin outline of Potential Summary Judgment Joinder." *Id.* Beginning on February 13, 2002, the date on which Dillard's filed its Summary Judgment Motion in the Bankruptcy Court, time records reflect the following time entries:

02-13-02	REVIEW PLEADINGS FROM ETM BANKRUPTCY	JEC	.6
02-14-02	EVALUATION OF TRUSTEE'S ADVERSARY PROCEEDING AND MOTION FOR SUMMARY JUDGMENT AGAINST DILLARD'S	LLR	.3
02-14-02	CONTINUE WORK ON BANKRUPTCY ISSUES RE OBJECTION TO DILLARD'S CLAIM AND TRUSTEE LITIGATION	JEC	1.0
02-15-02	CALLS FROM TRUSTEE RE JOINDER IN SUMMARY JUDGMENT	JEC	.4
02-19-02	REVIEW INFORMATION AND STRATEGY RE TRUSTEE'S CASE AGAINST DILLARD'S AND USE OF DILLARD'S PLEADINGS FOR MOTION FOR SUMMARY JUDGMENT	MMD	.7
02-26-02	CALL FROM ETM TRUSTEE RE PLEADINGS IN STATE COURT CASE RELEVANT TO BANKRUPTCY SUMMARY JUDGMENT	JEC	.4
02-21-02	LETTER TO MR. O'MALLEY (PLAINTIFFS' GENERAL COUNSEL RE ETM PLEADINGS	JEC	.3
02-26-02	CALL FROM [11] ETM TRUSTEE RE PLEADINGS IN STATE CASE RELEVANT TO BANKRUPTCY SUMMARY JUDGMENT	JEC	.4
03-13-02	WORK WITH ETM TRUSTEE RE SUMMARY JUDGMENT HEARING ON BANKRUPTCY CLAIMS AGAINST DILLARD'S	JEC	.6

03-14-02	WORK WITH TRUSTEE COUNSEL RE ARGUMENTS AGAINST DILLARD'S AND INCONSISTENT POSITIONS IN STATE AND BANKRUPTCY COURT	JEC	.8
03-28-02	WORK WITH ETM TRUSTEE RE SUPPLEMENTAL BRIEFS ON DILLARD'S ARGUMENT RE SOURCE OF FUNDS	JEC	.6
04-05-02	WORK WITH TRUSTEE [IN] ETM ON SUMMARY JUDGMENT ARGUMENTS	JEC	.7
04-08-02	CONTINUE WORK WITH TRUSTEE RE APRIL 10 SUMMARY JUDGMENT HEARING	JEC	1.1
04-10-02	WORK WITH TRUSTEE AND CALLS AFTER SUMMARY JUDGMENT HEARING RE STATUS	JEC	.5
04-15-02	REVIEW SUMMARY JUDGMENT PLEADINGS FOR USE IN STATE COURT CASE	JEC	.5

The Trustees Motion for Summary Judgment and Dillard's Motion for Summary Judgment were briefed and filed contemporaneously. It appears that Plaintiffs did at least know about both adversary proceedings and the summary judgment proceedings.

By supporting the Trustee's efforts, but declining to actually intervene, Plaintiffs had the best of all worlds: if the Bankruptcy Court judge denied Dillard's Motion for Summary Judgment, Plaintiffs would be in a position to contend that their third party benefactor ETM/DTS (represented by and through the Trustee) had prevailed on, and Dillard's had lost on, the Section 2.1 interpretation, and that Dillard's was bound by that decision here. If, however, as happened, the Trustee lost the Section 2.1 argument, then

Plaintiffs, by having declined to appear of record in the Bankruptcy Court, would be in a position to argue, as they have here, that the Section 2.1 analysis conducted by the Bankruptcy Court did not apply to Plaintiffs because they had not been parties to, or even known about, the adversary proceeding. The fact is that Plaintiffs *did know* about the adversary proceedings, *did participate* (albeit behind the scenes) in the proceedings, and [12] would have sought to take advantage of the ruling if the Bankruptcy Court had ruled favorably for them when interpreting Section 2.1. In short, Plaintiffs adopted a "wait and see" posture that left them in a position to strategically take advantage of any result in the bankruptcy proceedings.

In Arizona, however, parties are not allowed to "wait and see." In *Garcia v. General Motors*, 195 Ariz. 510 (App. 1999), a group of Arizona residents were injured in an automobile accident in Idaho while driving in a van manufactured by General Motors. None of the plaintiffs were wearing seatbelts. One of the injured passengers sued immediately in Idaho, and the court granted the plaintiff's motion *in limine* to exclude all evidence that she failed to wear her seatbelt because Idaho did not recognize a seat belt defense.

The remaining passengers subsequently filed lawsuits in Maricopa County Superior Court against General Motors. Plaintiffs moved to strike General Motors' use of the seatbelt defense, arguing that the Idaho court's ruling on the first plaintiff's motion bound General Motors. The trial court struck General Motors' use of the seatbelt defense and affirmed that the Idaho rule would apply under a doctrine of "offensive collateral estoppel." 195 Ariz. at 513-514, *citing* to *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 4 (1979). ("[O]ffensive use of collateral estoppel

occurs when a plaintiff seeks to foreclose a defendant from litigating an issue that defendant has previously litigated unsuccessfully in an action with another party. Defensive [collateral estoppel] occurs when a defendant seeks to prevent a party from asserting a claim the plaintiff has previously litigated and lost against another defendant.")

The Court of Appeals in *Garcia* declined to allow a "wait and see" posture to succeed:

> Under the *Parklane* analysis, the attempted use of collateral estoppel in this case would be offensive and might well be found to be improper because the plaintiffs are represented by the same counsel who represented [the first plaintiff] in the Idaho suit, and all plaintiffs could easily have been joined in that lawsuit, but [13] were not. . . . Moreover, attempted offensive use of estoppel such as occurred in this case unfairly allows a plaintiff to sit on the sidelines of the earlier adjudication and to "wait and see" how it turns out. [*Citing Parklane*, 439 U.S. at 330.] If the first plaintiff wins, the second plaintiffs can rely on the previous judgment against the defendant; but if the first plaintiff loses, the second plaintiff is not bound. *See id.* The Supreme court has reasoned that such offensive use of collateral estoppel should not be allowed: thus, offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

Garcia, 195 at 514, fn. 2. Although Plaintiff's here have not used the doctrine of "offensive collateral estoppel" *per se*, the *Garcia* analysis, and the policy against giving a

party the opportunity to wait and see applies with equal force.

In light of the revelation about the Plaintiffs' participation in the bankruptcy summary judgment proceedings, the doctrine of *defensive collateral estoppel* in fact and law barred them from challenging the Bankruptcy Court's rulings interpreting Section 2.1. Defensive collateral estoppel requires five elements in Arizona: (1) the issue must have been actually litigated in a previous proceeding, (2) the parties must have had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits must have been entered, (4) resolution of the issue must be essential to the decision, and (5) there must be common identity of the parties. *Garcia v. General Motors Corp.*, 195 Ariz. 510, 514 (App. 1999).

Here, there can be no dispute that the Section 2.1 issues was actually litigated, as set out above. The Trustee had a full and fair opportunity to litigate the issue, and obviously had every interest in prevailing against Dillard's. Moreover, Plaintiffs had a full and fair opportunity to intervene in the summary judgment pleadings; although they chose not to intervene, they nevertheless had a chance to. The Bankruptcy Court interpretation was essential to the Court's decision to grant summary judgment on the breach of contract cause of action.

[14] Finally, for issue/claim preclusion purposes in Arizona, a judgment has a preclusive effect upon parties and persons in privity with parties. *Scottsdale Mem. Health Sys., Inc. v. Clark*, 157 Ariz. 461, 466 (1988). In *Hall v. Lalli*, 194 Ariz. 54, 57 (1999), the Arizona Supreme Court held that a party may be considered to be in privity with another party where there is "both a substantial identity

of interest and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." "Privity is not the result of the parties having similar objectives in an action but of the relationship of the parties to the action and the commonality of their interests." *Id.* at 58. That doctrine applies in particular in collateral estoppel analysis. *Parklane Hosiery*, 439 U.S. at 326 ("collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of relitigating an identical issue with the same party *or his privy* and of promoting judicial economy by preventing needless litigation") (emphasis added).

Plaintiffs alleged, when contending that the doctrine of *res judicata*/collateral estoppel did not apply here, that they "were also not in privity with ETM or DTS." Plaintiffs' Reply in Support of Motion for Partial Summary Judgment at 4, n. 3. By virtue of *Hall*, Plaintiffs *were* in privity with the bankruptcy Trustee in the summary judgment pleadings in the Bankruptcy Court. They and the Trustee had a commonality of interests (as both worked to defeat Dillard's Motion for Summary Judgment and to prevail on the Trustee's motion.) The facts that Plaintiffs were aware of the bankruptcy proceedings, that they considered intervening in the summary judgment proceedings, that they "work[ed] with [the] trustee" regarding the summary judgment proceeding undermines their arguments regarding the applicability of the doctrines of *res judicata* and collateral estoppel. They should be estopped to challenge the Bankruptcy Court's holding.

CONCLUSION

For these reasons, Dillard's requests that the Court revisit its decision, reconsider the results, and grant judgment to Dillard's.

* * *

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

AZPB LIMITED PARTNERSHIP dba ARIZONA DIAMONDBACKS; PHOENIX SUNS LIMITED PARTNERSHIP dba PHOENIX SUNS; and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs, vs. DILLARD'S, INC., a Delaware corporation, fka Dillard Department Stores, Inc.; JOHN DOE, Defendants.	No. CV2000-012428 **DEFENDANT DILLARD'S, INC.'S SECOND MOTION FOR RECONSIDERATION** (Assigned to the Hon. Michael J. O'Melia)

I. INTRODUCTION

Dillard's submits its Second Supplement to its Motion for Reconsideration, which reflects and summarizes the contents of further newly discovered evidence bearing on Section II of Dillard's Memorandum in Support of its Motion for Reconsideration, addressing the inaccuracy of

Plaintiffs' repeated claims they were unaware of existence of the Adversary Proceedings in the Bankruptcy Action or the Summary Judgment Motions filed therein. The newly discovered and disclosed evidence shows, among other things, that contrary to their representations here, Plaintiffs' lawyers had a copy of Dillard's Motion for Summary Judgment within two days after Dillard's served it upon the Trustee, and that they actively participated in, strategized about and monitored both the Adversary Proceedings and the

* * *

[3] In response to these arguments at the summary judgment level, Dillard's counsel undersigned looked in the bankruptcy pleadings for, but did not find, evidence that Plaintiffs either had been served or otherwise knew or should have known about either the Adversary Proceeding and the summary judgment motions filed there in. In the absence of any such evidence, and because of Plaintiffs' repeated representations of ignorance Dillard's had no factual basis to claims that the Plaintiffs were in privity with the Trustee by virtue of their close ties to the Trustee during the Adversary Proceeding. Although Dillard's also claimed that the Plaintiffs' rights, at best, could be no better than the party to the Transition Agreement though whom they claimed rights (*i.e.*, ETM/DTS, as represented by and through the Trustee), the Court rejected that analysis.

III. Plaintiffs Knew Everything they Needed to know to about the Adversary Proceeding and the Summary Judgment Motions, as it happened.

A. Plaintiffs' Counsel Knew about the Adversary Proceedings Before Motions for Summary Judgment had been Filed Therein

As set out in Dillard's Motion for Reconsideration, and its First supplement thereto, Dillard's learned after the Court's ruling in this matter – when reviewing Plaintiffs' Application for Attorneys' Fees – that Plaintiffs actually knew about the Adversary Proceeding and the fact that Motions for Summary Judgment would be filed before either the Trustee or Dillards had filed their respective cross-motions. Gallagher & Kennedy partner Joseph Cotterman's time entries showed that beginning in late January 2002 he began to research "potential bankruptcy counterclaim[s] against Dillards." Exh. 1 at 1/21/02 entry. By February 1, 2002, according to Mr. Cotterman's time entries, he had developed a "strategy and outline of projects re bankruptcy document review, depositions, subpoenas, and summary judgment motions." Exh. 1, 2/1/02 entry.

On February 5, 2002, Mr. Cotterman recorded a meeting with Plaintiffs' general counsel, Mr. O'Malley, and Plaintiffs' trial counsel, Mr. Deatherage and Mr. Klein, regarding "discovery strategy, bankruptcy issues, and trial scheduling" as well as "telephone calls to bankruptcy trustee re document production and summary judgement proceedings." [4] Exh. 1 at 2/5/02 entry. Neither the Trustee nor Dillard's had filed Cross-Motions for Summary Judgment at that point, but as the evidence discussed below shows, both planned to file simultaneous briefs on or about February 13, 2002.

On February 6, 2002, Mr. Cotterman recounted additional "work with bankruptcy trustee counsel re *claims against Dillards, intervention in bankruptcy, and summary judgment issues.*" Exh. 1 at 2/6/02 entry (emphasis added). Counsel for the Trustee, the California firm of Marshack, Shulman, Hodges & Bastian ("Marshack Shulman"), through its lawyer J. M. Jennings, recorded a call from Mr. Cotterman on February 6, 2002, as: "Telephone conference with Joe Codderman's [sic] office, Arizona counsel for Diamond Backs and Suns, regarding the status of the Trustee's adversary proceeding against Dillard's." Exh. 2 at 2/6/02 entry. On February 7, 2002, Mr. Cotterman recorded more time for "research re potential claims against Dillards through ETM bankruptcy proceedings." Exh. 1 at 2/7/02 entry.

On February 8, 2002, Mr. Cotterman sent a letter to Mr. Jennings, in which he re-introduced himself as representing Plaintiffs in this case. Exh. 3. Mr. Cotterman wrote that he understood that "that the Adversary [proceeding] involves similar, and perhaps some of the same, transactions and issues."[1] *Id.* He told Mr. Jennings that he "would like to talk to you about the claims and defenses in the Adversary, and get a copy of the pleadings filed therein, particularly the following pleadings that show up on the Pacer docket report," including the Complaint, Answer and various status reports filed by the Trustee and

[1] On August 6, 2003, Dillard's asked Plaintiffs to produce this letter, as well as other related correspondence between the two lawyers or firms, and relevant entries from a separate billing file through which Gallagher & Kennedy apparently billed Plaintiffs for their work while working on Plaintiffs' claims in the bankruptcy. Plaintiffs provided the February 8, 2002 correspondence and some relevant e-mails on August 20, 2003, two weeks later.

Dillard's, as well as a copy of "the motion for summary judgment" that Mr. Jennings had mentioned in a voice mail message. Exh. 3.

[5] Mr. Jennings reviewed Mr. Cotterman's letter on February 11, 2002. Exh. 2 at 2/11/02 entry. He characterized the letter in his time entry as describing the "relationship between the instant adversary proceeding and [Plaintiffs'] outside litigation." *Id.* He responded that day by e-mail, in which he thanked Mr. Cotterman for his "letter of February 8, 2002, regarding our *mutual interests* re Dillard's, et al." Exh. 4 (emphasis added). Mr. Jennings told Mr. Cotterman that he would have his staff put together copies of the requested documents "immediately." *Id.* In response to Mr. Cotterman's description of a position allegedly taken by Dillard's in this case, Mr. Jennings said he found Dillard's alleged position of "particular interest" because he "fully expect[ed]" Dillard's to take a different position in its "yet to be filed motion for summary judgment. . . ." Mr. Jennings concluded: "I should expect [Plaintiffs' and the Trustee's] *mutual positions* to be in accord on this matter. . . ." *Id.* (emphasis added).

On February 12, 2002, Mr. Deatherage recorded time for a "conference with Mr. Cotterman re claims and litigation in bankruptcy action." Exh. 1 at 2/12/02 entry (Deatherage). On the same day, Mr. Cotterman recorded that he "continue[d] work with Bankruptcy Trustee re document review . . . " *Id.* (Cotterman). On February 13, 2002, Mr. Cotterman recorded that he reviewed "pleadings from ETM Bankruptcy," *id.*, although it is not clear exactly which pleadings these were. *Id.* at 2/13/02 entry. On February 14, 2002, Mr. Deatherage recorded time devoted to "evaluation of Trustee's Adversary Proceeding and Motion for Summary Judgment against Dillards." Exh. 1

at 2/14/02 entry (Deatherage). Mr. Cotterman devoted time on that date to "continue work on bankruptcy issues re objection to Dillard's claim and trustee litigation." *Id.* (Cotterman).

B. Plaintiffs' Counsel Received Hard Copies of the Motions for summary Judgment in the Adversary Proceeding Two Days After they had been Filed

On February 14, 2002, the day after the Trustee and Dillard's had filed their respective Motions for Summary Judgment, Mr. Jennings sent a set of documents to Mr. Cotterman by Federal Express. Exh. 2 at "Expenses Section," entry booked on 2/21/02. [6] According to Mr. Jennings' time records for that day, he spoke to Mr. Cotterman "regarding issues relating to the Trustee's motion for summary judgment" and "directed preparation of materials to [Mr. Cotterman] re summary judgment." Exh. 2 at 2/14/02 entry. In a cover note addressed to Mr. Cotterman and dated February 14, 2002, Mr. Jennings wrote that he was forwarding the documents "pursuant to our telephone conversation this afternoon." Exh. 5.

Mr. Cotterman received a package of documents from Mr. Jennings via Federal Express, most likely on February 15, 2002. The package included the Adversary Complaint, Dillard's Answer, a couple of status reports, and *both* the Trustee's and Dillard's respective Motions for Summary Judgment.[2] *See* Exhs. 6A-6D. The Dillard's motion that

[2] In its letter of August 6, 2003, Dillard's asked Plaintiffs to produce the materials that Mr. Jennings sent to Mr. Cotterman in this package on February 14, 2002. Although Plaintiffs provided copies of the February 8, 2002 correspondence on August 20, 2003, as set out in

(Continued on following page)

Mr. Jennings sent was the very same motion that Plaintiffs told this Court and Dillard's that they did not receive "until May 9, 2002, almost three months after it filed the Motion on February 13, 2002, and *after* it had been argued and submitted for decision." *See* Exh. 6-A.

The Court no doubt is familiar already with the substance of Dillard's motion as it related to Section 2.1 of the Transition Agreement. *See, e.g.*, Motion to Reconsider at 3-9. In its Motion for Summary Judgment, the Trustee argued, just as Plaintiffs did here, that Dillard's refusal to transfer the disputed funds "constituted a breach of the specific terms of" the Transaction Agreement. Exh. 6-B at 4. In support, Plaintiffs discussed in detail the background of the Transition Agreement and specifically quoted the now-infamous language of Section 2.1 that has also been at the center of the dispute here. *Id.* at 7. The Trustee argued, as Plaintiffs did here, that "Dillard's was specifically prevented from offsetting delinquent payments from ETM against cash receipts from ticket sales to be remitted by Dillard's to ETM." *Id.* "Pursuant to the Transition Agreement and the ordinary course of [7] dealing between the parties, the Transferred Funds should have been forwarded to ETM so that ETM could collect its fees and disburse funds to the various sports and entertainment venues." *Id.* 8. Plaintiffs thus contemporaneously knew exactly what arguments the Trustee had raised with regard to Section 2.1, exactly what arguments Dillard's had raised about Section 2.1, and what evidence both parties had mustered in support of their respective arguments. And they

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footnote 1, Plaintiffs provided copies of the documents only on September 2, 2003.

knew that in this case they were raising the same argument here.

C. Plaintiffs Considered Intervening in or Joining with the Trustee's Motion for Summary Judgment

On February 11, 2002 – two days before the parties in the Adversary filed their respective Motions for Summary Judgment Mr. Cotterman began an "outline of potential summary judgment joinder," in which Plaintiffs considered whether to intervene in the summary judgment proceedings in the Bankruptcy Court. Because the effort was directed toward a "joinder" in a summary judgment matter related to this case and because the only summary judgment motion pending in which Plaintiffs could have "joined" was in the Adversary Proceeding, it is clear from the records that the "summary judgment joinder" was directed toward the Adversary Proceeding – not toward a motion in this case.

Moreover, on the same day, Mr. Klein devoted 2.2 hours to "conduct legal research re third party beneficiary claim for summary judgment" Notably, the Plaintiffs' Fee Application does not record so much as a minute of time to work on a summary judgment motion in either this case or the bankruptcy case until the date on which Mr. Cotterman began to outline a potential joinder in the Trustee's motion, again suggesting that the Plaintiffs were preparing a motion to file in the Bankruptcy Court. On February 12, 2002, Mr. Klein devoted another 1.1 hours to "draft motion for partial summary judgment on third party beneficiary theory." On the same date, Mr. Cotterman devoted time to continue "work with bankruptcy Trustee re . . . summary judgment arguments."

On February 15, 2002, the day that he received copies of the Cross-Motions for Summary Judgment in the adversary proceedings, Mr. Cotterman recorded in his time that he [8] had received "calls from Trustee rejoinder in summary judgment Exh. 1, 2/15/02 entry (Cotterman). Mr. Klein recorded on that day he had "an office conference with Mr. Cotterman re Bankruptcy Documents." Exh. 1, 2/19/02 entry (Klein). Dillard's presumes that the conference related to the documents that Mr. Cotterman had just received from Mr. Jennings. Several days later, on February 19, 2003, Mr. Deatherage recorded time to "review information and strategy re Trustee's case against Dillard's and use of Dillard's pleadings for motion for summary judgment." *Id.* at 2/19/02 entry. On February 21, 2002, Mr. Cotterman wrote a "letter to [Plaintiffs' General Counsel] Mr. O'Malley re ETM pleadings." *Id.* at 2/21/02 entry.

On February 22, 2002, Mr. Klein recorded 1.8 more hours to "conduct legal research re third party beneficiaries; draft Motion for Summary Judgment." *Id.* at 2/22/02 entry. He recorded another 2.6 hours on February 25, 2002 to "conduct legal research re third party beneficiaries; draft motion for partial summary judgment." *Id.* at 2/25/02 entry. On February 26, 2002, Mr. Cotterman recorded time for a call with "ETM Trustee re pleadings in state court case relevant to bankruptcy summary judgment." *Id.* at 2/25/02 entry. On February 28, 2002, Mr. Klein devoted another 1.6 hours to "draft motion for summary judgment." *Id.* at 2/28/02 entry.

On March 1, 2002, Mr. Klein devoted 4.1 hours to "conduct legal research regarding third party beneficiary; draft Motion for Partial Summary Judgment, conduct legal research regarding right of offset." *Id.* at 3/1/02 entry.

On March 4, 2002, Mr. Deatherage recorded time to a preliminary review and comment on draft Motion for Partial Summary Judgment." *Id.* at 3/4/02 entry. On March 13, and March 14, 2002, Mr. Cotterman recorded time, respectively, to "Work with ETM Trustee re Summary Judgment hearing on Bankruptcy claims against Dillard's" and to "Work with Trustee counsel re arguments against Dillards and inconsistent positions in state and Bankruptcy Court." *Id.* at 3/13/02-3/14/02 entries.

[9] On March 19, 2002, Mr. Jennings called Mr. Cotterman again "regarding [Mr. Cotterman's] client's interest in interceding [sic] into the summary judgment process." Exh. 2, 3/19/02 entry (Jennings). By that time, however, Plaintiffs must have decided not to join or intervene in the adversary summary judgment, because they ultimately did not join or intervene and active work on their Motion for Partial Summary Judgment had, for the most part, stopped, until the Plaintiffs again geared up to prepare their Motion for Summary Judgment in this case. Dillard's presumes that Plaintiffs decided they would be better off as a non-party to the Adversary summary judgment proceedings and thereby in a position to take advantage of the results if the Trustee won, and able to distance themselves from the proceedings by claiming they were non-parties if the Trustee lost – a classic "wait and see" posture.

D. Plaintiffs Actively Assisted the Trustee in Trying to Defeat Dillard's After they Decided not to Join or Intervene in the Pending Motions

Although Plaintiffs decided not to join as parties of record in the bankruptcy summary judgment proceedings,

they nevertheless participated behind the scenes by offering their counsel, coordination and assistance to the Trustee to help the Trustee defeat Dillard's. For example, on March 28, 2002, Mr. Cotterman recorded "work with ETM Trustee re supplemental briefs on Dillards' argument re source of funds." Exh. 1 at 3/28/02 entry. On April 5, 2002, he recorded time to "work with Trustee [in] ETM on summary judgment arguments." *Id.* at 4/5/02 entry. On April 8, and 10, 2002, Mr. Cotterman charged time to help the Trustee prepare for the April 10, 2002 oral argument on the Motions for Summary Judgment in the Adversary Proceeding and "calls after summary judgment hearing re status." *Id.* at 4/8/02-4/10/02 entries.

On June 11, 2002, Mr. Cotterman charged time to "work with ETM Trustee counsel re [Bankruptcy Code] 553(B) setoff argument to defeat Dillard's possessory claim to collected funds." Exh. 1 at 6/11/02 entry. On June 12, 2002, Mr. Jennings, Mr. Deatherage and Mr. Klein all participated in an e-mail exchange about the Bankruptcy Court's adverse decision. Exh. 7. Mr. Cotterman apparently shared some work product about Section 553; [10] Mr. Jennings thanked him for the information and asked for Mr. Cotterman's view about how that section might apply in the Adversary Proceeding. He also noted that he would "wait for Mark [Deatherage] or Patrick [Klein] to call." *Id.*

Mr. Deatherage charged time on June 12, 2002 to "Review information and status re bankruptcy case with Mr. Cotterman and review emails re same." Exh. 1, 6/12/02 entry (Deatherage). Mr. Cotterman recorded the effort for that day as "Work with ETM Trustee re evidence from bankruptcy case and pending discovery; work with Mark Deatherage re same." *Id.* (Cotterman). Mr. Jennings

described his charges as "Telephone conference with Joe Cotterman regarding status of proceedings and state court proceedings against Dillard's." Exh. 2 at 6/12/02 entry. He also billed to "Review and analyze email correspondence for counsel for the Arizona Diamondbacks regarding their state court proceedings against Dillard's et al to determine positions taken by Dillard's regarding the ownership of transferred funds; drafted reply thereto regardin[g] 553(B) issues." *Id.* (second entry).

E. The Plaintiffs' Representations to this Court were Inaccurate

Dillard's is puzzled by disconnect between the amount and depth of Plaintiffs' knowledge of the summary judgment motions in the Bankruptcy Court and the number and definitiveness of statements of ignorance about those proceedings here. In defense of its fee application, reply to Dillard's arguments that it was unreasonable to charge Dillard's for the Plaintiffs' pursuit of a claim in Bankruptcy Court, Plaintiffs wrote:

> Throughout this case, Dillard's argued that Plaintiff's case should be transferred to Bankruptcy Court, that Plaintiffs' remedy existed only in the Bankruptcy Court, and that Plaintiffs were bound by the Bankruptcy Court's rulings. . . . Given Dillard's arguments, all rejected by this Court, Plaintiffs were required to research bankruptcy-related issues and to monitor and evaluate various issues and events in the ETM bankruptcy case.

Plaintiffs' Reply in Support of Motion for Attorneys' Fees at 9.

[11] Plaintiffs could either be ignorant about bankruptcy Adversary Proceedings *or* very familiar with the proceedings because they believed that they were "required" to monitor them as part of their due diligence in prosecuting this case. But they cannot have been both ignorant of the proceedings, as they repeatedly claimed, *and* at the same time "required" to have monitored and evaluated various issues and events in the ETM bankruptcy case. If Plaintiffs believed from the start of the case they were "*required*" to research, monitor and evaluate the bankruptcy proceedings (including the Adversary Proceedings), and they in fact did that, how and why did they claim to be ignorant about those proceedings throughout the briefing in this case? In light of the claims of ignorance they made throughout the briefing in this case, how can they defend their fees now by claiming that Plaintiffs were, from the very start, "required" to monitor the bankruptcy proceedings? Plaintiffs' position about their state of knowledge seems to change depending on the circumstances.

III. ADDITIONAL ARGUMENT AND ANALYSIS

A. Applicable Law

Dillard's incorporates by reference the applicable law as set out in its Motion to Reconsider at 9-14.

B. Plaintiffs Should have Disclosed their Interactions with the Trustee

There was nothing inherently inappropriate about the Plaintiffs coordinating with the Trustee in their joint dispute with Dillard's. It is obvious that Plaintiffs and the

Trustee shared the same exact goal – to join forces to defeat Dillard's first, and in particular, to defeat Dillard's at the Adversary summary judgment stage. Mr. Jennings probably best summed up the collective views for the parties – the money at issue must belong to "anyone other than Dillard's." Exh. 7.

The fact that Plaintiffs indeed shared a commonality of interests with the Trustee is best demonstrated by the facts that Plaintiffs did not remain neutral in the summary judgment proceedings in the Adversary action, nor did they seek to render assistance to Dillard's in its dispute with the Trustee. Nor did they try to play off Dillard's against the [12] Trustee to their own benefit. They helped the Trustee, plain and simple, because aligning themselves with the Trustee and the Trustee's interests made strategic sense for them.

It is thus astounding that Plaintiffs could and would have represented to this Court and to Dillard's that they did not have "any commonality of interests" with the Trustee, or that they did not know about the Adversary Proceedings, or that they did not have timely notice of the summary judgment motions in the Adversary or that they did not participate in, or even have the opportunity to participate in, the summary judgment in the Adversary Proceedings. Every such representation was directly opposite to the actual state of facts.

Plaintiffs made all of these arguments so that they could claim that they were not in privity with the Trustee. Putting aside Dillard's argument that Plaintiffs, as alleged third party beneficiaries, *had* to be in privity with ETM/DTS, they were, in fact and law, in privity with the Trustee as a result of their own conduct. Thus, both

Plaintiffs and the Trustee (acting on behalf of ETM/DTS) have a "substantial identity of interest and, working or functional relationships . . . " in which Plaintiffs' interests were presented and protected by the Trustee. Their commonality of interest was clear. *See Hall v. Lalli*, 194 Ariz. 54, 57, *cited* at Dillard's Motion for Reconsideration at 14.

Dillard's does not know how Plaintiffs came to make the misleading statements contained in their pleadings. Plaintiffs have refused Dillard's request to take Mr. Cotterman's deposition and stated they would object to efforts to take Mr. Jennings' deposition or to subpoena him for records.[3] In light of Plaintiffs' refusal to allow Mr. Cotterman to be deposed, Dillard's of course will object to any effort by Plaintiffs to explain away the circumstances of affidavit or declaration.

[13] Regardless of how the misrepresentations occurred, it was, at the least, unfair to Dillard's that Plaintiffs would declare virtual ignorance about the bankruptcy proceedings while they vigorously supported the Trustee and contemporaneously considered, on multiple occasions, the possibility of intervening in those proceedings.

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[3] Undersigned counsel told Plaintiffs' counsel in early August, 2003 that he thought he would need to take Mr. Cotterman's deposition, but that he wanted to get all of the evidence he had requested in his letter of August 6, 2003 before making the final decision. Plaintiffs took about a month to produce the evidence, by which time yet another month of interest at about $7400 per month ran. Dillard's decided it could not wait another couple of months to brief and argue a Motion to Compel, then take time to schedule a deposition if it won, and then to file this supplement.

Plaintiffs were able to work the system to their advantage – and to do so successfully by winning here after they effectively lost in the Bankruptcy Court.

By denying the existence of any relationship whatsoever between Plaintiffs and the Trustee, Plaintiffs were allowed to take a wait and see position with regard to the bankruptcy Motion for Summary Judgment, deny any relationship that would lead to a finding of privity, then re-litigate the issues here in a second bite at the apple.

Dillard's is confident that Plaintiffs certainly would have taken advantage of a favorable decision in the Bankruptcy Court. It is hard to imagine that they would not have claimed privity through their purported third party beneficiary status if the Trustee had won in Bankruptcy Court. They might even have claimed to be in privity by claiming that they had a substantial commonality of interests with the Trustee as a result of the interactions that have only recently come to light.

C. Public Policy Favors Overturning the Judgment

The result of this case, as it presently stands, rewards the "wait and see" attitude and allows for – indeed encourages – the ability to forum shop. Dillard's sought an Order dismissing the case early in the proceedings because neither the Plaintiffs nor Dillard's could join ETM/DTS – an obviously indispensable party. The Court denied that motion out of hand, even before Plaintiffs filed an Opposition. Regardless of the results of the Bankruptcy Court decision, the Court should reconsider and overturn its previous Order as a clear indication that it disfavors forum shopping, disfavors a significant failure to disclose that

allowed Plaintiffs to successfully forum shop, and disfavors allowing Plaintiffs to adopt a "wait and see" attitude.

* * *

IN THE COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS; PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP,	No. 1 CA-CV-04-0338
Plaintiffs-Appellees,	
v.	Maricopa County Superior Court
DILLARD'S, INC., a Delaware corporation, f/k/a Dillard Department Stores, Inc.,	No. CV 00-012428
Defendant-Appellant.	

OPENING BRIEF OF
DEFENDANT-APPELLANT DILLARD'S, INC.

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* * *

[39] ("Since the beneficiary is subject to all of the terms of the contract between the promisor and the promise, the beneficiary is also vulnerable to defenses of the promisor that arise under those terms during the performance of the agreement"). Arthur Linton Corbin, Corbin on Contracts 810 (Interim ed. 1951, 2002) ("There is no difference

in this respect between the contract right of a the third party beneficiary and the contract right of any promise. The remedies available to a beneficiary are exactly the same as would be available to him if he were a contractual promisee of the performance in question").

C. Analysis

It is undisputed that a court with competent jurisdiction over both ETM/DTS and Dillard's analyzed the rights and remedies between those two parties under the Transition Agreement and determined that: i) Dillard's had not breached Section 2.1 of the Transition Agreement; ii) Dillard's could recoup its losses from ETM/DTS. Appellees as matter of law may not have rights under the Transition Agreement better than ETM/DTS and should be precluded *as a matter of law* from recovering under a breach of contract theory, even if they are third party beneficiaries.

The Court concluded that the bankruptcy decision did not apply here because the motions for summary judgment "filed in the Bankruptcy Court seemed [40] to be for breach of contract and did not specify paragraph 2.1." This statement is difficult to understand or accept objectively in light of the substantial record showing that the breach of contract action in the Bankruptcy Court addressed section 2.1. *exclusively*. The result here gives Appellees rights and remedies that were better than ETM's rights and remedies – a result that cannot stand under Arizona law.

Moreover, even if they are third party beneficiaries, the Appellees must stand in the shoes of ETM and DTS. ETM and DTS materially breached the Transition Agreement. These payments were not just "late," the money was not coming at all. ETM/DTS repudiated the Transition

Agreement ETM and DTS violated the implied covenant of good faith and fair dealing by allowing Dillard's to keep performing even after they knew that Dillard's would not receive payment. Appellees, standing in the shoes of ETM/DTS, have to live with the fact that their purported "benefactor" under the Transition Agreement breached, defaulted under, and repudiated the Transition Agreement.

Appellees never responded to these argument below. Rather, they Claimed that the Bankruptcy case was irrelevant because they were not parties thereto, and did not have knowledge about the proceeding. To the extent that [41] those statements are not accurate, as discussed above, then the analysis failed of its own weight.

III. The Court Erred by Excluding Briefs from the Bankruptcy Summary Judgment Proceedings and then again when it Evaluated the Quality of Evidence in Bankruptcy Court Proceedings

A. Standard of Review

The question about determining the preclusive effect of another case on a pending case presents a question of law, for which the standard of review is *de novo*. *E.g.*, *Hall v. Lilli*, 194 Ariz. 54 (1999).

B. Applicable Law

[A]n existing final judgment rendered upon the Merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive as to every point decided therein and also as to every point raised by the record which could have been decided, with respect to the parties and their

privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction" *Indus. Park Corp. v. U.S.I.F. Palo Verde Corp.*, 26 Ariz. App. 204, 206, 547 P.2d 56, 58 (App. 1976) (*quoting Hoff v. City of Mesa*, 86 Ariz. 259, 261, 344 P.2d 1013 at 1014 (1959)).

A judgment is impervious to collateral attack, as long as the court that rendered the judgment had subject-matter jurisdiction and personal jurisdiction over the parties. *Walker v. Davies*, 113 Ariz. 233, 235, 550 P.3d 230, 232 (1976) [42] (citing *Sch. Dist. #1 of Navajo County v. Snowflake U.H.S. Dist.*, 100 Ariz. 389, 391-92, 414 P.2d 985, 987 (1966)). Even if the judgment is erroneous or wrong, and "could be reversed on appeal or set aside on direct attack," it is not subject to collateral attack if jurisdiction existed. *Id.* (citing *Sch. dist. #1 of Navajo County*, 100 Ariz. at 391-92, 414 P.2d at 987); *see also Springfield Credit Union v. Johnson*, 123 Ariz. 319, 323-24, 599 P.2d 772, 776-77 (1979; *Fraternal Order of Police, Lodge 2 v. Superior Court*, 122 Ariz. 563, 565, 596 P.2d 701, 703 (1979) ("The fact that the issue may have been determined incorrectly does not affect the principle of *res judicata*); *State ex rel. Lassen v. Self-Realization Fellowship Church*, 21 Ariz. App. 233, 235, 517 P.2d 1280, 1282 (1974.)

Arizona courts recognize that judgments may not always be free from error, however, the rule that judgments import verity and may not be collaterally attacked" stems from the overarching interest in "the bringing of differences to a peaceful trial and settlement. One of the oldest reported cases puts it in this apt language: 'The judgment of the law, like the hand of death, puts an end to all strife.'" *Shattuck v. Shattuck*, 67 Ariz., 122, 131, 192 P.2d 229, 235 (1948), *overruled on other grounds by*

Marvin Johnson, P.C. v. Myers, 184 Ariz. 98, 907 P.2d 67 (1995).

[43] C. Analysis

To understand what had been litigated in the Bankruptcy Court, the trial court had to, as a matter of law, review the underlying bankruptcy summary judgment briefs so that it could determine what issues had been actually litigated. Indeed, it appears that the Court might have looked at those briefs, in fact, because somehow it drew the conclusion that it was "not convinced that the Bankruptcy considered all of the issues involved." One wonders how the Court could possibly have drawn such a conclusion unless it actually looked at the underlying briefs. If it drew that conclusion without looking at the underlying briefs, then its conclusion is without legal or factual foundation. If the Court looked at the briefs and then did not admit them into evidence, then that is error.

Thus, when the Court excluded those briefs, it erred either because it had actually considered the briefs or because the law required it to consider those briefs and it refused to do so. The Court's treatment of this evidence violated the Court's duties under the law to substantively consider the events at the Bankruptcy Court proceedings.

Having recognized that the parties in the Bankruptcy Court actually litigated the Section 11 issue, however, as the Court did, the Court could not evaluate the evidence or conclude that the judgment was somehow not adequately [44] supported. It had no choice under the law except to note that ETM/DTS had lost the Section 2.1 argument, conclude that Appellees stood in the shoes of ETM/DTS,

and determine that they could have no better rights as purported third party beneficiaries.

IV. The Trial Court Abused its Discretion in Awarding Attorneys' Fees to Appellees

The award of discretionary attorneys' fees is subject to an abuse of discretion standard. Here the Court noted that it found the issue to be close, and that Dillard's claims and contentions gave it "pause."

Dillard's respectfully requests that if this Court also finds the issue "close," then it should not award attorneys' fees to Appellees because of the nature of the dispute.

On the other hand Dillard's contends that the issue was not "close." The law is clear, the facts are clear and Appellees' arguments lack merit. If Dillard's prevails under such circumstances, it requests an Order directing the Court to award Dillard's its reasonable attorneys' fees under A.R.S. § 12-341.01.

ATTORNEYS' FEES

Dillard's request a award of fees on its appeal.

* * *

IN THE COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS; PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs-Appellees, v. DILLARD'S, INC., a Delaware corporation, f/k/a Dillard Department Stores, Inc., Defendant-Appellant.	No. 1 CA-CV04-0338 Maricopa County Superior Court No. CV 00-012428

REPLY BRIEF OF DEFENDANT-APPELLANT DILLARD'S, INC.

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* * *

[7] Appellees should not ask this Court to look *just* at the raw Bankruptcy Court judgment and at the same time refer to and rely on passages of the bankruptcy summary judgment pleadings. Appellees have waived or withdrawn their objections to the admissibility of these documents and have given their blessing to this Court's review of the

briefs in their entirety. Unfortunately, their waiver/withdrawal comes too late for the trial court, who excluded the briefs from evidence and, thus, did not fully and properly review them.

4. ETM/DTS and Dillard's Actually Litigated a Breach of Contract Claim Arising from Section 2.1 in the Bankruptcy Action

The plain words in the Bankruptcy Court summary judgment pleadings show that the parties actually litigated the breach of contract action arising from Section 2.1. Appellees do not dispute these undeniable facts and thus concede, again by their silence, that the parties in the Bankruptcy Action actually litigated a breach of contract action arising from Section 2.1.

5. Appellees Cannot Collaterally Attack the Quality and Quantity of Evidence Presented in the Bankruptcy Action

a. Appellees Improperly Collaterally Attacked the Substance of the Evidence Presented in the Bankruptcy Action

In response to Dillard's Opening Brief charging Appellees with improperly collaterally attacking the judgment Appellees state twice on the same [8] page – literally – that they are not "attempting to collaterally attack the bankruptcy court's judgment." Resp. at 43, line 2, and n. 19. They then confess that "in truth" they are not sure exactly "what Dillard's is arguing." *Id.* at n. 19.

Black's Law Dictionary defines "Collateral Attack" as:

> With respect to a judicial proceeding, an attempt to avoid, defeat or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it [citation omitted]. An attack on a judgment in any manner other than by action or proceeding, whose very purpose is to impeach or overturn the judgment; or stated affirmatively, a collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment [citation omitted].

Black's Law Dictionary (5th Ed. 1979). Black's Law Dictionary defines "impeach" as, among other things, "to dispute, disparage, deny or contradict; as to impeach a judgment or decree. . . ." *Id.*

Here, Appellees seek to impeach the Bankruptcy Court judgment thorough a collateral attack by bringing this incidental action – *i.e.*, an action other than an appeal of the Bankruptcy Action – to dispute, disparage, deny and contradict the Bankruptcy Court's judgment regarding the breach of contract action.

Specifically, for example, Appellees complain at least five times that the Bankruptcy Court "considered issues and facts that were either different from, [9] or not presented to, the trial court." Resp. at 42. *See also id.* at 3, 18, 51, 52. In particular, they complain, Dillard's presented evidence in the Bankruptcy Action that ETM/DTS anticipatorily repudiated the Transition Agreement, but did not put on that evidence here. Therefore, they contend "both the legal issues and the underlying facts in this case were

materially different from those presented in the bankruptcy case." *Id.* at n. 18.

This argument suffers from a substantial legal flaw. First, Appellees are not entitled to attack the nature, quality or quantity, of evidence presented in the Bankruptcy Action. *Indus. Park Corp. vs. U.S.I.F. Palo Verde Corp*, 26 Ariz. App. 204, 206, 547 P.2d 56, 58 (App. 1976) (a judgment "is conclusive as to every point decided therein and also as to every point raised by the record which could have been decided . . . "). *See also* Open. Br. at 41. The decision in then Bankruptcy Action granting Dillard's summary judgment on the breach of contract claim settled every point raised or that could have been raised regarding every aspect of any breach of contract claim brought under Section 2.1 and, thus, deprived Appellees of a right to challenge the evidence later in a different forum. Right, wrong or indifferent, that decision bound ETM/DTS and, therefore, bound those seeking to claim rights as third party beneficiaries, and cannot be re-opened by collateral attack in the evidence.

[10] Second, there is incontrovertible evidence that ETM/DTS materially breached the Transition Agreement, intended to hide that breach from Dillard's and hoped to leave Dillard's holding the bag for its financial misconduct and mismanagement. Open. Br. at 8-9; *see also* Dillard's Post-Trial Brief on Liability at 11-12 (RCA 70, Supp. Apdx. 25). Regardless of whether ETM's conduct constituted a formal anticipatory repudiation or just an undisclosed material breach of the Transition Agreement, Appellees never have challenged the fact or legal conclusion that ETM/DTS breached the Transition Agreement, that ETM/DTS procured services on Appellees' behalf and benefit without paying for them. ETM/DTS' actual and

intentional breach of contract excused Dillard's duty under Section 2.1.

Appellees speculate and/or argue at least four times that the Bankruptcy Court concluded that the funds did not belong to ETM/DTS. Resp. at 49 (it is "possible that the bankruptcy court granted Dillard's motion on the threshold issue only (*i.e.*, whether the ETM/DTS estate owned or had an interest in the ticket revenues) . . . "); *see also* at 52 ("the bankruptcy court might well have based its ruling on any one of a variety of issues that are unique to the bankruptcy setting and bankruptcy law or that are otherwise irrelevant to the proceedings in [11] this Court – including, most likely, that the funds at issue were not property of the bankruptcy estate"); *id.* at 45 (speculating that it is "reasonable and likely" that the Bankruptcy Court decided that the Estate "had no interest in the money"); *id.* at 47 ("All the bankruptcy court decided was that ETM/DTS had no right in the ticket revenues; those revenues belonged to someone else"). They also speculate that "Even the contract issues the bankruptcy considered were materially impacted and altered by the effect of preemptive federal bankruptcy law on state law contract and property law and rights." *Id.* at 46.

This speculation is interestingly ironic, coming as it does from the same parties who in the same case have urged the trial court and this Court not to look at the bankruptcy summary judgment pleadings to determine what the parties actually litigated and urged repeatedly that it is impossible to tell exactly what was the basis of the Bankruptcy Court's decision. *Supra.* at § I.B.3. Appellees have no special insight in this regard, and their guesswork is of no legal bearing. If guessing is allowed, one might speculate just as easily that the Bankruptcy

Court rejected Dillard's claim that the funds did not belong to the Estate, but nevertheless determined that Dillard's could recoup them. The beauty of the common law system and the doctrine of finality of judgments is that they render all such speculation irrelevant.

[12] Moreover, the argument is just wrong and mischaracterizes Dillard's position in the Bankruptcy Court. As Dillard's argued below, and in the Bankruptcy Court, the money did not belong to the bankruptcy Estate because Dillard's recouped it from ETM/DTS *before* the Estate ever existed. In Dillard's precise words: "ETM did not file a Chapter 7 until June 29, 2000 – seven days after the money became Dillard's as a result of recoupment." Dillard's Response to Plaintiff's Motion for Summary Judgment at 8 (ROA 57, Dillard's Supp. Apdx. 24).

Finally, to the extent Dillard's argued in the Bankruptcy Action that the funds did not belong to ETM/DTS, it also argued that ETM/DTS was an agent for Appellees. *See, e.g.*, Dillard's Motion for Summary Judgment on all Claims Asserted by Trustee James J. Joseph at 22 (Dillard's Apdx. at 14) ("It is undisputed that ETM/DTS's right to sell tickets was granted pursuant to Ticket Service Agreements ('Ticket Agreements'). As part of the Ticket Agreements, ETM/DTS and the venue created an agency relationship. Under the heading of "Agency," the form agreements provide that the venue 'hereby retains and authorizes ETM to act as its exclusive ticketing agent for the sale of tickets made available generally to the public." (Dillard's Apdx. Tab 14.)

[13] If Appellees want to speculate that the Bankruptcy Court accepted Dillard's arguments in this regard, then their speculation must also include an admission that

the Bankruptcy Court determined ETM/DTS acted as Appellees' agents and, thus, that Appellees are liable as the principal for the undisputed misconduct of their agent.

b. Appellees Inappropriately Attack the Bankruptcy Court's Subject Matter Jurisdiction

Dillard's contended in its Opening Brief, among other things, that that the Bankruptcy Court was "a court with competent jurisdiction over both ETM/DTS and Dillard's. . . ." Open. Br. at 39. That statement in itself seemed uncontroversial, because the Trustee of ETM/DTS itself brought the action in the Bankruptcy Court, neither party challenged the Court's jurisdiction, the Court heard arguments about and ruled on the breach of contract claim, and that decision went through an appeal without anyone attacking the Court's jurisdiction.

But Appellees nevertheless collaterally attack the Bankruptcy Court's subject matter jurisdiction to decide the breach of contract count – at least nine times. Resp. at 43 ("As a court of limited jurisdiction, the bankruptcy court only decided issues insofar as they implicated the ETM/DTS bankruptcy estate and its property"); *id.* at 44 ("The bankruptcy court had jurisdiction over the issues raised only to the extent that the issues involved assets that were properly part of the

* * *

[15] court's jurisdiction, as the parties' rights were based on state law claims [and] existed independently of federal bankruptcy law . . . ").

This argument is wrong for three reasons. First, it too is a classic collateral attack that the law strictly prohibits.

Second, appellees lack standing to attack the subject matter jurisdiction of the Bankruptcy Court. Third, the argument completely misses the point. When the Court resolved "the rights of the ETM bankruptcy estate" under Section 2.1, and everyone now agrees that it did, it necessarily decided the rights of any purported third party beneficiary seeking third party beneficiary contractual rights under Section 2.1, as discussed above. Appellees are incorrect when they deny that the Bankruptcy Court resolved the Section 2.1 claims.

c. The Bankruptcy Judgment and the Trial Court's ruling are not Consistent

In a twisted logic that only a lawyer could love, Appellees argue at least three times they are not impeaching the breach of contract results in the Bankruptcy Action because the result of the section breach of contract claim there was consistent with the trial court's ruling on the breach of contract action here. Resp. at 46-47 ("The trial court's decision is consistent with the bankruptcy court's decision . . . "); *id.* at 46 ("The two decisions are not inconsistent . . .); *id.* at 47 ("Nothing in Appellees' suit against Dillard's . . . is inconsistent with the [16] bankruptcy court's decision"). But a winning result for Dillard's on a Section 2.1 breach of contract action brought in the Bankruptcy Action is, at the least, inconsistent with a losing result on the same issue here.

6. The Court Improperly Collaterally Analyzed and Attacked the Bankruptcy Court's Decision Under Section 2.1

a. The Trial Court Improperly Evaluated the Evidence in the Bankruptcy Court

i. Appellees Improperly Encouraged the Trial Court to Do So

Appellees are at least in large part to blame for the court's legal error below. In their Post-Trial brief, they told they the trial court to ignore the Bankruptcy Court's conclusions on Section 2.1 and to re-decide the issue itself. Appellees' Post-Trial Closing Statement (ROA 71) at 32. ("If the actual facts here had been presented to the bankruptcy court, it may have come to a much different conclusion. The decision it did reach on a different, inaccurate record is neither binding nor relevant to this action. This Court should reach its own independent conclusion based on the facts presented in this trial.")

[17] **ii. With the Appellees' Encouragement, the Court Independently Reviewed, and then Rejected, the Bankruptcy Court's Analysis**

The trial court wrote: "[T]he court is not convinced that the bankruptcy considered all of the issues involved." The Court exceeded its authority by reviewing, analyzing and weighing the evidence and arguments presented to the Bankruptcy Court regarding the breach of contract issue. In essence, the trial court criticized the Bankruptcy Court's conclusions by finding that if the Court had only considered certain other factors, it would have come to another conclusion. A trial court cannot do that, even if it

disagrees with the result in another case. *See generally* Open. Br. at 41-42 (analyzing law of finality of judgments).

The trial court should have gone no further than to compare the Complaints in the Bankruptcy Action and here determined that both Complaints brought an action for breach of contract under Section 2.1, determined from the bankruptcy summary judgment proceeding that the parties actually litigated the claim, determined that the Bankruptcy Court ruled on that claim, and then ruled that it could not revisit that matter because the Bankruptcy Court already had resolved it.

[18] **b. The Court Erred by Concluding that it was not Bound and by the Bankruptcy Judgment Regarding Section 2.1**

The trial court concluded that it was not bound by the judgment rendered in the Bankruptcy Action. ("If this Court is bound by the Bankruptcy Court's ruling, obviously this ruling is incorrect.") But the issue was not whether the Bankruptcy Action judgment bound the *trial court*; the question more properly was whether the Bankruptcy Action judgment construed ETM/DTS' claims that Dillard's had breached Section 2.1 of the Transition Agreement. The court erred by refusing to constrain its analysis to that question after it concluded that Appellees qualified as intended third party beneficiaries.

7. The Trial Court Erroneously Concluded that the Bankruptcy Breach of Contract Action "did not Specify Paragraph 2.1"

The court held that "The Motion for Summary Judgment filed in the Bankruptcy Court seemed to be for

breach of contract and did not specify paragraph 2.1." Even Appellees did not argue that the breach of contract action in the Bankruptcy Court raised something other than Section 2.1, and Appellees were noticeably silent in the Response when it came to trying to justify that particular conclusion.

[19] C. Appellees' Collateral Estoppel Arguments are Misplaced

1. The Collateral Estoppel Doctrine is a *Separate* Doctrine from a Third Party Beneficiary Analysis

Appellees have always mixed the two separate legal doctrines of third party beneficiary analysis and collateral estoppel analysis into one, arguing that if they can win on the collateral estoppel analysis because Dillard's cannot prove all five elements of collateral estoppel, that they, therefore, should also win under the third party beneficiary analysis. But Dillard's raised the collateral estoppel argument as an *alternative* to, not a substitute for, the third party beneficiary analysis. Losing the collateral estoppel analysis would not preclude Dillard's from prevailing under the third party beneficiary analysis, and vice versa.

2. Collateral Estoppel Bars Appellees from Re-litigating Section 2.1

a. Actually Litigated Issue

See Section I.B.4, *supra*.

b. Motive to Litigate

Appellees contend that they "lacked a motive to litigate the issues raised in the bankruptcy proceeding." Resp. at 49. The question is not whether *Appellees* had a motive to litigate the breach of contract action in Bankruptcy Court; the question was whether *ETM/DTS*, the parties through whom Appellees [20] claim as third party beneficiaries, had sufficient motive to litigate it. Obviously, ETM/DTS had such motive because it had to defeat Dillard's first before it could take on claims by Appellees.

c. Valid and Binding Judgment

Appellees contend that the "bankruptcy court did not enter a valid and final decision on the merits of *this* case." Resp. at 51 (emphasis added). That statement is true, but nonsensical. Estoppel would never be "collateral" unless the previous action occurred in a *different* case. *Bridgestone/Firestone v. Dionico Naranjo*, 206 Ariz. 447, 79 P.3d 1206 (App. 2003) (collateral estoppel "permits a *new defendant* in a *subsequent case* to . . . preclude re-litigation" of an issue).

d. Essentiality of Evidence

Appellees contend that Dillard's has not established "as an initial matter, that the bankruptcy court decided the issues under the Transition Agreement, and more specifically Dillard's has provided no support for the notion that such a decision was 'essential' to the bankruptcy court's granting Dillard's Motion for Summary Judgment." Resp. at 42. Short of an express statement from the Bankruptcy Court stating that it had considered the arguments with regard to the breach of contract

action, and that it found those arguments "essential" to its conclusion, it is not clear what kind of evidence would or could possibly satisfy [21] Appellees' demands – especially when they have argued that the trial court properly excluded the briefs that set out the arguments supporting Dillard's position. Dillard's believes that all of the facts and analysis set out in this brief support its claim in this regard, if not expressly, then at least by implication.

e. Privity and Common Interest

Appellees contend that they were "not in privity with any party to the bankruptcy proceeding." Resp. Br. at 52. Of course they were. First, they were in contractual privity with ETM/DTS through their own Ticketing Service Agreement. Second, when they contended that they were third party beneficiaries to Section 2.1 of the Transaction Agreement, Appellees agreed that their interest in the resolution of the breach of contract claim in the Bankruptcy Action was tied inextricably with the Trustee's and ETM/DTS' interests. They were in privity in fact.

As Appellees acknowledge, "privity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship' . . . in which the interests of the non-party are presented and protected by the party in the litigation." Resp. Br. at 53, *citing Hall v. Lalli*, 194 Ariz. 54, 57, par. 8, 977 P.2d 776, 779 (1999). Appellees and ETM/DTS had not both a [22] "substantial identity of interest," and completely identical interests because, as noted above, both needed to defeat Dillard's.

II. Appellees were not Intended Third Party Beneficiaries

The parties have devoted so much ink, argument and time to this issue that there is little left to say that has not been said before. Dillard's respectfully incorporates by reference and refers the Court to Dillard's Post-Trial Brief on Liability, 1-8 (ROA 70, Dillard's Supp. Apdx. at 25).

The two things that Dillard's would like to emphasize here are: i) No one expected Dillard's to perform for free or to do so as a shill for ETM and DTS while they conspired openly (but secretly toward Dillard's) to seek and obtain services for their clients, including Appellees, with no ability to pay or intention of paying. Appellees, thus, try to enforce Section 2.1 as third party beneficiaries under inequitable circumstances that neither ETM/DTS nor Dillard's ever expected or contemplated; ii) Section 4.4 says what it says – that there were to be no third party beneficiaries under the Transition Agreement. Appellees wish, and frequently argue without evidentiary foundation, that the language was "boilerplate." Resp. at 25. There just was no such evidence. *See* Dillard's Post-Trial Brief on Liability at 4-6 (ROA 70, Dillard's Apdx. at 25).

* * *

IN THE COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS; PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, Plaintiffs-Appellees, v. DILLARD'S, INC., a Delaware corporation, f/k/a Dillard Department Stores, Inc. Defendant-Appellant.	___ S. Ct. No. ___ No. 1 CA-CV04-0338 Maricopa County Superior Court No. CV 00-012428

DEFENDANT-APPELLANT
DILLARD'S, INC.'S PETITION FOR REVIEW

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* * *

[5] June 23, 2000, Dillard's remitted an additional $1.452 million to ETM. *Id.* At that time, Dillard's also retained approximately $1.489 million – precisely the amount ETM owed Dillard's for its services. App. 1 at I, ¶ 28; App. 11.

Likewise, it is also undisputed that the bankruptcy trustee in the consolidated bankruptcy filed a seven count

complaint against Dillard's, seeking recovery from Dillard's of the same monies which Plaintiffs have sought in this action. App. 13. Among other claims, the bankruptcy trustee sued Dillard's for preferential transfer, breach of the Transition Agreement, breach of an implied covenant of good faith and fair dealing, an accounting and declaratory relief. *Id.* The Bankruptcy Court granted summary judgment to Dillard's on all counts in the trustee's complaint. App. 16. The United States District Court for the Central District of California affirmed on February 21, 2003, *id*, and the matter is currently on appeal to the Ninth Circuit.

This case was tried to the bench, the Honorable Michael J. O'Melia presiding, and on May 16, 2003, the trial court issued a minute entry finding in favor of Plaintiffs. App. 18. The trial court recognized that its decision contradicted the decision of the bankruptcy court and federal district court, stating that "If this Court is bound by the Bankruptcy Court's rulings, obviously this ruling is incorrect." *Id.* The trial court then embraced Plaintiff's contract theory,

* * *

[8] received," Dillard's was not unjustly enriched. *AM Leasing, Ltd.*, 786 P.2d at 1050. Moreover, to require Dillard's to pay the money to Plaintiffs would unjustly deprive Dillard's of the benefit of its bargain with ETM. As both the Bankruptcy Court and the District Court held, Dillard's actions in retaining the money it was owed was lawful. There can be no unjust enrichment when Dillard's conduct was lawful. *See City of Sierra Vista*, 144 Ariz. at 382, 697 P.2d at 1132 (no unjust enrichment "since the City received what it had a legal right to receive").

The Court of Appeals concluded that "The withholding of funds that properly belonged to ETM is sufficient to create an enrichment in Dillard's and an impoverishment in Plaintiffs." *Decision*, ¶ 31. But the Court of Appeals completely disregarded the Bankruptcy Court's holding that the funds did *not* belong ETM. The Court of Appeals' decision, ruling for the Plaintiffs on an unjust enrichment theory without the benefit of any trial court findings, deprives Dillard's of the benefit of its contract with ETM, transfers a loss from one creditor to another in defiance of the Bankruptcy Court, and turns unjust enrichment law on its head.

II. The Trial Court and Court of Appeals Have Improperly Disregarded the Rulings of the Federal Courts.

Collateral estoppel or issue preclusion applies when "an issue was actually litigated in a previous proceeding, there was a full and fair opportunity to litigate [9] the issue, resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of parties." *Hullett v. Cousin*, 204 Ariz. 292, 297-98, 63 P.3d 1029, 1034-35 (2003). Similarly, the doctrine of *res judicata* precludes a claim "when the former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, *or might have been*, determined in the former action." *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779 (1999) (emphasis added). "Even were the ruling erroneous, it cannot be attacked collaterally." *Springfield Credit Union v. Johnson*, 123 Ariz. 319, 324, 599 P.2d 772, 777 (1979).

Here the bankruptcy court has already held, in an adversary action brought by the trustee in ETM's bankruptcy case, that Dillard's properly retained the amounts that ETM owed Dillard's and therefore that the trustee could not recover that amount for the bankruptcy estate. As creditors of ETM, the bankruptcy trustee acted on the Plaintiffs behalf. The Plaintiffs were thus in privity with the trustee and their claims are precluded. While recognizing that its decisions contradicted the rulings of the bankruptcy court, App. 18, the trial court also refused to admit the summary judgment briefs filed in the bankruptcy court by Dillard's and the bankruptcy trustee. ROA 97, 98; App. 21.

[10] The Court of Appeals then compounded the trial court's error in holding that "Because we find the trial court erred in its determination of that Plaintiffs were third-party beneficiaries to the contract, we need not address Dillard's arguments . . . that the trial court erred in its use of documents and arguments from the bankruptcy court proceeding." *Decision*, ¶ 23 n.3. The Bankruptcy Court's ruling, however, applied equally to preclude Plaintiffs' unjust enrichment theory. Dillard's was not unjustly enriched if it merely received the benefit of its contract with ETM. The Court of Appeals' decision in this matter not only misapplies the law regarding unjust enrichment, but also fails to grant the Bankruptcy Court's ruling the deference and effect it deserves.

III. The Court of Appeals Acted Improperly When It Failed to Defer to the Trial Court and Instead Fashioned Equitable Relief on Its Own.

Granting or denying equitable relief "is within the sound discretion of the trial court, and its decision will not

be reversed absent an abuse of that discretion." *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 366, 982 P.2d 1277, 1280 (1999). The discretion in equitable proceedings lies with the trial court, and not the appellate court, and thus the trial court should be allowed to fashion the proper equitable remedy:

> Not only is the trial court in a better position than [the appellate] court to weigh the equities and fashion the appropriate equitable relief, but it can also require the parties to develop a factual record on which to base its decision.

* * *

APPENDIX 2

Bankruptcy Litigation Complaint – pp. 1, 5.

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA,
SANTA ANA DIVISION

In re ETM ENTERTAINMENT NETWORK, INC., f.d.b.a. WINPOINT INTERACTIVE MULTIMEDIA SYSTEMS, Successor in Interest to DILLARD TICKETING SYSTEM, INC. Debtors.	Case No. SA 00-15113 LR Chapter 7 Adversary no. SA01-01172LR CHAPTER 7 TRUSTEE'S COMPLAINT FOR: (1) AVOID PREFERENTIAL TRANSFERS; (2) RECOVER PREFERENTIAL TRANSFERS; (3) BREACH OF CONTRACT; (4) TURNOVER; (5) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; (6) ACCOUNTING; AND (7) DECLARATORY RELIEF
JAMES J. JOSEPH, the Chapter 7 Bankruptcy Trustee, Plaintiff, vs. DILLARD'S, INC.; and DILLARD'S STORE SERVICES, INC. Defendants.	

) (Filed April 23, 2001)
) Status Conference Date
)
) Date: To be Set
) Time: To be Set
) Place: Room 5D
) Ronald Reagan Federal
) Blg.
) 411 West 4th Street
) Santa Ana, CA 92701
) (Demand for Jury Trial)
)

Summons Issued: Apr. 23, 2001
Answer: _____ 2001
Status Conference:
Date: _____ 2001 at 9:00 a.m.

* * *

[5] The Debtor's sales with their credit card receipts.

25. The Debtor provided Dillard's with periodic sales reports to assist Dillard's with accounting for these credit card transactions.

26. The issuance and review of these reports created delays in Dillard's forwarding the money received from the credit card financial institutions back to the Debtor. A second delay occurred between the time the Debtor received the ticket income from Dillard's and when sports and entertainment venues received payment for the ticket sales from the Debtor.

27. The Debtor acted as a conduit through which the sports and entertainment venues received their income from ticket sales for events. ETM deducted an agreed-upon processing fee for its services and forwarded the balance of sales proceeds to the various venues.

28. Within ninety (90) days prior to the Petition Date, the Debtor sold tickets in the manner described above in its ordinary course of business.

29. These sales were processed as was usual and appropriate through the Dillard's computer server.

30. The possession of the related sales proceeds was placed necessarily and temporarily into Dillard's possession for collection of funds from the credit card companies.

31. As indicated above, Dillard's was contractually bound to submit these funds to the Debtor so that the Debtor may submit payment to the various sports and entertainment venues for their portion of the Debtor's ticket sales.

32. On or about June 22, 2000, Dillard's violated the terms of the Transition Agreement and issued a Notice of Offset to the Debtor advising it that Dillard's was offsetting $1,440,354.20 of ticket proceeds against amounts the Debtor allegedly owed Dillard's in accrued fees.

33. These funds were in Dillard's possession for the sole purpose of processing sales, and pursuant to the Transition Agreement and the course of

* * *

APPENDIX 3

Petitioner's pleading in the Bankruptcy Litigation entitled "Dillard's, Inc.'s and Dillard Store Services, Inc.'s Response in Opposition to Trustee James J. Joseph's Motion for Summary Judgment or in the Alternative Summary Adjudication of Issues Regarding Trustee's First and Second Claims for Relief" – pp. 1, 8-13.

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA,
SANTA ANA DIVISION

In re ETM ENTERTAINMENT NETWORK, INC., f.d.b.a. WINPOINT INTERACTIVE MULTIMEDIA SYSTEMS, Successor in Interest to DILLARD TICKETING SYSTEMS, INC. Debtors.	Case No. SA 00-15113 LR Chapter 7 Adversary No. SA 01-01172 LR DILLARD'S, INC.'S AND DILLARD STORE SERVICES, INC.'S RESPONSE IN OPPOSITION TO TRUSTEE JAMES J. JOSEPH'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES REGARDING TRUSTEE'S FIRST AND SECOND CLAIMS FOR RELIEF.
JAMES J. JOSEPH, the Chapter 7 Bankruptcy Trustee, Plaintiff, vs. DILLARDS, INC.; and DILLARD'S STORE SERVICES, INC. Defendants.	

) Hearing
)
) Date: March 13, 2002
) Time: 10:30 a.m.
) Place: Courtroom 5-D
)
) (Filed Feb. 27, 2002)

* * *

[8] Courts reason that "preferred" treatment is acceptable because recoupment is a defense to a claim against the creditor, as opposed to a mutual obligation. *Id.* The logically related, mutually dependent and intertwined nature of the parties' obligations justifies recoupment.

Indeed, recoupment has been defined as "the right of a defendant to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with the cross obligations . . . arising under the contract upon which suit is brought." *McDonald,* 244 B.R. at 867. That is this case! Dillard's properly exercised its lawful recoupment rights, and there is nothing unjust or improper about it. Accordingly, the Trustee's Motion should be denied, and judgment should be entered in favor of Dillard's.

B. The Trustee's Motion Also Fails Because The Money The Trustee Seeks To Recover Is Not Property Of ETM/DTS' Estate.

"Property of the estate" is a required component of a preference. Code Section 547(b) limits any recovery to transfers of "property of the debtor." *Begier v. I.R.S.,* 496 U.S. 53, 58 (1990) ("the reach of § 547(b)'s avoidance power is therefore limited to transfers of 'property of the debtor' "). The Trustee's Motion candidly concedes that

"[t]he term 'transfer' requires that a party have an interest in the property transferred." (Trustee's Mem. at pg. 11). Here, the Trustee has none. The recouped fund is ***not*** property of ETM/DTS' estate because: (i) ETM/DTS had no interest in the money as of the commencement of the bankruptcy case; and (ii) as an "agent" of the venues, ETM/DTS had no ownership nor equitable interest in the money.

[9] **1. ETM/DTS Had No Interest In The Money Recouped As Of The "Commencement Of The Case."**

Property of a debtor's estate is determined "as of the commencement of the case." 11 U.S.C. § 541(a); *see also In re Pettit,* 217 F.3d at 1079 (the relevant time period for assessing what interest, if any, the party possesses is at the time the bankruptcy petitions are filed). It is undisputed that on June 22, 2000, Dillard's sent ETM/DTS a letter indicating that Dillard's was retaining (recouping) approximately $1.4 million which ETM/DTS owed Dillard's under the Transition Agreement. (Ltr. Worley to ETM, 6/22/00; App. Ex. N, pg. 145). ETM did not file a Chapter 7 petition until June 29, 2000 – seven (7) days ***after*** Dillard's recouped the money. Thus, ETM/DTS had no interest in the money recouped as of the commencement of the bankruptcy case.

---

[5] *See also Newbery,* 95 F.3d at 1403 (finding that recoupment is appropriate when "it would . . . be inequitable for the debtor to enjoy the benefits of that transaction without meeting its obligations."); *In re Harmon,* 188 B.R. at 425 (activation of recoupment rights "goes to the equity of the claim").

2. The Money Recouped Is Not Property Of The Estate Because ETM/DTS Has No Equitable Interest In Proceeds Based On Its Role As "Agent" For The Venues.

ETM/DTS' right to sell tickets was granted pursuant to Ticket Service Agreements ("Ticket Agreements"). (Dec. H. Leanders, Chapter 7 Trustee for ETM at ¶ 4; App. Ex. F, pg. 62). ETM/DTS had Ticket Agreements with approximately 200 venues as of June 2000. (*Id.*). A copy of a representative form Ticket Agreement is attached to the Declaration of Trustee Leanders as Exhibit 2. (Dec. H. Leanders; App. Ex. F, pg. 88).

Under the Ticket Agreements, ETM/DTS and the venue created an "agency" relationship. Under the heading "Agency," the Ticket Agreements provide that the venue "hereby retains and authorizes ETM to act as its ***exclusive ticketing agent*** for the sale of tickets made available generally to the public." (Dec. H. Leanders, Chapter 7 Trustee for ETM at Ex. 2, ¶ 2; App. Ex. F, pg. 92) (emphasis added). Under these form agreements, [10] ETM/DTS was "obligated to pay the [venue] an amount equal to the gross ticket proceeds collected by ETM," less amounts ETM was entitled to retain under the agreement. (*Id.* at ¶ 6). As an agent, ETM/DTS had no right to retain any ticket proceeds apart from its fees.

This is Hornbook law. An agent must account for all property entrusted to him by his principal. *Michelson v. Hamada,* 29 Cal.App.4th 1566, 36 Cal.Rptr.2d 343 (Cal. Ct. App. 1994).[6] Property held by an agent does ***not*** vest

[6] Whether an interest claimed by the debtor is "property of the estate" is a federal question to be decided by federal law; however,

(Continued on following page)

the agent with equitable title to the property. *E.g., Seymour v. Slide & Spur Gold Mines,* 153 U.S. 523, 525 (1894) (noting the "general rule that an agent in possession cannot deny the title of his principal"); *see also Ramey v. Myers,* 111 Cal.App.2d 679, 685 (Cal. Ct. App. 1952) ("moneys received by one in the capacity of agent are not his"). This is equally true for proceeds of goods sold by an agent. *Reiter v. Anderson,* 87 Cal.App. 642, 649 (Cal. Ct. App. 1927) ("the principal, who remains the owner of the goods . . . has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission . . . ") (emphasis in original). As a selling "agent" for the venues, ETM/DTS had no right to ownership nor equitable title to proceeds from the sale of tickets.

Section 541(d) of the Bankruptcy Code specifically provides that when a debtor possesses only legal title in property, the debtor's estate does ***not*** include any equitable interest in that property. 11 U.S.C. § 541(d); *In re Bybee,* 945 F.2d 309, 315 (9th Cir. 1991) (citing *Whiting Pools,* 462 U.S. at 204) ("[t]he legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor [11] interest such as a lien or bare legal title"); *In re Torrez,* 827 F.2d 1299, 1303 (9th Cir. 1987) (Because "[t]he Debtors possessed nothing beyond bare legal title . . . [t]he estate has no interest in the property.").

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bankruptcy courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the commencement of the case. *In re Pettit,* 217 F.3d at 1078 (citing *Butner v. United States,* 440 U.S. 48, 54-55 (1979)). The form agreement used by ETM/DTS provides that it shall be construed under and governed by California law. (*Id.* at ¶ 9(f))

Courts consistently hold "[a]s a general rule, if property is in the debtor's hands as agent, the property or proceeds are not treated as property of the debtor's estate." *McMakin v. Pine Bush Equip. Co., Inc.*, 242 B.R. 271, 276 (D.N.J. 1999); *see also In re Rine & Rine Auctioneers, Inc.*, 74 F.3d 854, 857 (8th Cir. 1996); *In re The Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1179 (3d Cir. 1996); *Covey v. Cmty. Nat'l Bank*, 224 B.R. 673, 676 (Bankr. C.D. Ill. 1998) ("property held by a debtor as a bailee or agent is not property of a debtor's bankruptcy estate"); 5 COLLIER ON BANKRUPTCY ¶ 541.06[1][a] (15th ed. rev. 1999) (same). Since ETM/DTS served as "agent" for venues, it had neither ownership in nor equitable title to the property at issue. This money is not part of ETM/DTS' estate, and judgment is proper for Dillard's.

3. Statements And Conduct By Both The Trustee And ETM/DTS Confirm That The Money At Issue Is Not Property Of ETM/DTS' Estate.

The Trustee's Motion confirms that ETM/DTS had no right to retain money recouped by Dillard's. For example, the Trustee's Motion states that "[a]fter receiving ticket fees from Dillard's, ETM forwarded these funds to . . . the various sports and entertainment venues less any applicable service charge or handling fee." (Trustee's Mem. at pg. 8). The Declaration of Bennet Kelly, ETM/DTS' General Counsel and Vice President of Business Affairs, confirms that "ETM was to take its percentage from the Transferred Funds prior to issuing the remainder of the funds to the various venues with whom ETM had contracted to [12] perform services." (Trustee's Mem. at pg. 25). At no point prior to initiating this adversary proceeding did ETM/DTS

assert that it had any right to retain the money which it now seeks to classify as property of its estate.

In fact, consistent statements and conduct by ETM/DTS and the Trustee – both pre- and post-petition – confirm otherwise, to wit:

- The money collected by ETM/DTS was kept in "segregated accounts," separate from ETM/DTS' general operating accounts. (341 Meeting Trans. at pg. 9; App. Ex. G, pg. 113).
- At the 341 meeting, Mr. Kelly admitted that "[t]he position we took and which we still hold is that the monies which Dillard's would transmit to us ***constituted predominantly client money*** . . . that would normally have been distributed to clients in the ordinary course." (*Id.* at pg. 20) (emphasis added).
- As ETM/DTS' pre-petition financial condition deteriorated, ETM/DTS represented to its own executives and customers that "Client Settlement money was ***in a secured account and was safe from any bankruptcy proceedings.***" (Ltr. Bolman to ETM/DTS; App. Ex. S, pg. 154) (emphasis added).
- Some Ticket Service Agreements expressly required that ticket sale proceeds be "segregated" or held "in trust" by ETM/DTS until the money was sent to the venues. (*E.g.,* Texas Ranger Agr. at ¶ 6; App. Ex. I, pg. 134). ("ETM shall maintain a trust account on behalf of User [Rangers] and

other clients separate and apart from ETM operating accounts").[7]

- The Trustee's Complaint expressly states that ETM/DTS "***acted as a conduit*** through which the sports and entertainment venues received their income from ticket sales for events." (Trustees Cplt. at ¶ 27; App. Ex. D, pg. 34) (emphasis added).

- Mr. Kelly sent Dillard's a letter stating that DTS and ETM object to Dillard's withholding of money "collected ***on behalf of*** the clients" of DTS and ETM. (Ltr. B. Kelly to D. Worley, 6/22/00; App. Ex. L, pg. 142) (emphasis added).

[13] - Mr. Kelley sent letters to Dillard's requesting that the recouped money be sent to either ETM/DTS or directly to client venues "so that ***the client money*** that Dillard's holds can be distributed to the very clients who are counting on that money." (Ltr. Kelley to Worley, 6/27/00 at pg. 2; App. Ex. O, pg. 148) (emphasis added).

- And finally, the Trustee previously asserted positions in this Court completely contrary to the position now advocated in this case by entering an Agreement To Transfer Funds pursuant to which the Trustee agreed to have ticket proceeds (less commissions) held by King Scoopers returned to the Colorado Rockies – ***not this bankruptcy estate***. (Agr. To Trans. Funds; App. Ex. T, pg. 155).

In sum, it is undisputed that ETM/DTS served as an "agent" or "conduit" for the venues, and had no ownership

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[7] *See Mitsui Mfrs. Bank v. Unicom Computer Corp.*, 13 F.3d 321, 324 (9th Cir. 1994) (property held in trust by a debtor for another is not property of the estate).

rights nor equitable title to the monies at issue. The parties' statements and conduct confirm as much. The money recouped by Dillard's is not "property of the estate." The Trustee's Motion should be denied, and judgment should be entered for Dillard's.

C. Assuming *Arguendo* a Preference Exists (Which It Does Not) the Trustee's Preference Claim Fails Because Of Dillard's Statutory Defenses.

Even assuming *arguendo* that recoupment was not lawfully activated (which it was) and that there was a "transfer" of "property of the estate" (which there was not), the Trustee's Motion fails because of Dillard's new value and contemporaneous exchange defenses. It is undisputed that the very day after Dillard's recouped what it was owed, Dillard's wire transferred $1.45 million to ETM /DTS. (Ltr. D. Worley to B. Kelly, 6/23/00; App. Ex. P, pg. 151; *see also* Wire Receipt, App. Ex. R, pg. 153). In essence, Dillard's recouped approximately $1.4 million owed and then remitted approximately $1.4 million to ETM/DTS. This transfer served both as "new value" (i.e., money or money's worth) transferred to ETM/DTS and as a "contemporaneous exchange" for services provided to ETM/ DTS – each of which are valid statutory defenses to an alleged preference under

* * *

APPENDIX 4

Transcript of Oral Argument in Bankruptcy Litigation on Cross-Motions for Summary Judgment, April 30, 2002 – pp. 12-18

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

– o0o –

In Re: ETM ENTERTAINMENT NETWORK, INC., Debtor.	Case No. SA 00-15113-RA Santa Ana, California Tuesday, April 30, 2002 2:30 P.M.
JAMES J. JOSEPH, Plaintiff, vs. DILLARD'S INC., Defendant.	Chapter 7 Adversary No. SA 01-01172-RA Motion for summary judgment or in the alternative, summary adjudication of issues regarding trustee's first and second claims for relief to avoid and recover preferential transfer under Bankruptcy Code Section 547 regarding issue of entitlement to attorney fees only Motion for summary judgment regarding issue of entitlement to attorney fees only

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT ALBERTS
UNITED STATES BANKRUPTCY JUDGE

(Filed Jul. 18, 2002)

APPEARANCES:

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* * *

[12] remit money to them which Dillard's did fully in compliance with that request.

So even for the sake of argument that you could say that there was a improper action on behalf of Dillard's, there was no damage ever established by this record, by this evidence, because they gave them back exactly what they asked for. The fact that they may have misspent it, converted it, done whatever with it is really not our concern.

So – and on top of all that, there's a question as to whether or not the evidence would support that these are even their funds because they operated as a conduit, they operated as an agent. These were not their funds.

So, for all of these reasons, there's a distinction between the doctrines under the law. There's an abrogation of the contract, a repudiation of the contract. There was no waiver of rights by Dillard's with respect to any

other legal rights or remedies whatsoever. And it properly took action in the face of the facts that existed at that time.

THE COURT: When you say it's not – wasn't property, of the estate or it wasn't the debtor's property, the debtor – the money would go from your client to the debtor and then the debtor would remit net of its fees, right?

MR. PALANS: That's correct.

THE COURT: So, why do you say it wasn't the debtor's funds?

[13] MR. PALANS: Your Honor, the evidence was that the – this was other people's money. Under 541(d), property in which the debtor holds as of the commencement of the case only legal title and not an equitable interest becomes property of the estate only to the extent of the debtor's legal title to the property, but not to the extent of any equitable interest in the property that the debtor does not hold.

The Supreme Court case, I believe, we cited in our papers, Begier v. The IRS, Justice Marshall indicated that a debtor does not own an equitable interest in property he holds in trust for another. And that interest is not property of the estate. Nor is such an equitable interest property of the estate.

THE COURT: Yeah, but what about the debtor's right to remit net of the debtor's fees?

MR. PALANS: The debtor held that purely – the debtor, I think, breached its obligations to its sports venues. As between it, there is no evidence of entitlement

as between it and its venues as to fees. It had breached its obligations with respect to its venues.

THE COURT: In other words, you're saying the evidence supports the premise that the debtor was suppose to receive the payments from your client and remit in total to the venues, as you put it?

MR. PALANS: If after default, I think that is the [14] case. And they had provided evidence that they were in default to their respective venues. They had no entitlement to anything at that point. That's what the record supports. So for –

THE COURT: I know I've caught you off guard a little bit, but can you cite me to the portion of the record that supports that?

MR. PALANS: I'll try, Your Honor. The – we've attached various user agreements to our papers, they indicate that the debtor would act as agent for the sale of tickets. We've cited user agreements that the debtor would maintain a trust account on behalf of certain user clients and separate and apart from it, keep those –

THE COURT: Okay. Now, which exhibits are you looking at?

MR. PALANS: I'm sorry, Exhibit I to the motion.

(Pause)

THE COURT: That's not in the appendix. It's in the motion itself?

MR. PALANS: It's the motion, Dillard's –

THE COURT: All right. I'm going to take a brief recess and find it because I don't see it on the bench.

MR. BASTIAN: Your Honor, to echo that, we left a briefcase in the car that had all the motion papers from the MSJ. And I'd request permission to run down to the car and [15] grab that binder –

THE COURT: Okay.

MR. BASTIAN: – if we could because we were ready to address the issue on the fees and weren't quite ready to get involved in the substance that have been – that's been discussed here.

THE COURT: I understand that. All right. Let's take a few minute recess while I track down Dillard's motion. I know I saw it last night. I'm not sure what I did with it.

(Recess)

THE COURT: Now let's back up to the ETM matter. And I assume counsel has gotten their briefcase on trustee side and counsel has collected some more thoughts, if he so desires, on the defendant/movant side. So I'll hear first from the defendant/movant, if you wish.

MR. PALANS: Thank you, Your Honor. Couple of points, both from the recoupment side and also on the specific contract language and also with agency and property of the estate.

Your Honor, when I reflect back to our notes, I found a definition in Black's Law Dictionary that's appropriate and it defines recoupment. And again, recoupment affects not

only the statutory remedies of preference, but the contract remedies as well. It serves as a defense to both.

And Black's Law Dictionary defines recoupment as [16] keeping back something which is due because there is an equitable reason to withhold it. And it references a unjust results in equitable purpose. And the purpose of recoupment is to do justice in view of the transaction as a whole so that there is a settlement. There's an integrated transaction and a settlement so one amount is due.

The law on recoupment is distinguished from setoff, clearly distinguishes the two doctrines. And the B&L Oil Company case, which is cited in our papers at 762 F.2d 155, 159, Tenth Circuit, indicates that recoupment does not depend upon whether the parties expressly anticipated the problem at all. No expressed contractual right is necessary to effect a right of recoupment. We reserve that right under the agreement.

In essence, recoupment is the determination of the rights of the parties to a single transaction so as to determine the net liability, one to the other, from that single transaction. In the Newbery case, the Ninth Circuit in Newbery, clearly indicated that setoff does not apply to recoupment claims. That's Ninth Circuit law. So from the respective of recoupment, I think we've fully preserved and retained all rights and remedies.

For a matter of practice, I've given the backdrop of the defaults and non-payments and there was no refuting testimony evidence whatsoever to dislodge any of that. We gave [17] back to the debtor the exact amount they said they needed to pay their clients in full. That transmittal is attached, like a wire transfer, to our papers and it is Exhibit R to our motion. Exhibit R, page 153.

That was in response to a letter from Mr. Kelley, the debtor's general counsel requesting us – this is Exhibit O, page 147 – and granting us permission to transmit client monies collected by Dillard's. Client monies collected by Dillard's. We did. We gave it back. And what they did with it, we know not whence.

If there had been no bankruptcy, we could have asserted the same recoupment defense that we are now talking about. And the same issue would have arisen as to what damages this debtor would have suffered having remitting back to them everything that they so requested. Keep in mind, also, that recoupment is an equitable doctrine that is utilized to prevent unjust enrichment.

THE COURT: So you're saying that the only money that your client kept by way of the recoupment was the fee that the debtor was entitled to take. Is that what you're saying?

MR. PALANS: No, I'm saying the only money my client kept is what we were owed, nothing more. We gave back everything else. The evidence is we gave back everything else. It's –

THE COURT: Well, I understand that, but weren't you [18] just saying that the money that was remitted by your client was sufficient to cover the venues?

MR. PALANS: Yes, Your Honor. Yes, Your Honor. Exactly as Mr. Kelley had requested in his letter, that's what we gave back. So – I mean, swirling amongst this is the fact that they were an agent, that it was other people's money, that it was not property of the estate –

THE COURT: Oh, but the fact that they were an agent is disputed by the trustee, isn't it?

MR. PALANS: I don't believe so. They were in a representative –

THE COURT: Yeah. No, I think – okay. Go ahead.

MR. PALANS: They pleaded, Your Honor, that, in paragraph 27 of their complaint, ETM/DTS served as a conduit or pass-through. That's there admission.

Exhibit O, Mr. Kelley's letter, on June 22nd, requests Dillard's to return, quote, client money to clients directly, attaching a breakdown referencing the money which Dillard's holds, client money of ETM. Exhibit L, Mr. Kelley's letter, revenue collected on behalf of clients of ETM.

And perhaps most telling and what we put in our papers, but I'd like to just re-enforce, when presented with this same relationship before, this trustee represented to Judge Riddle and all parties with respect to money held by someone in the same position as Dillard's, and that was King

* * *

(2)

No. 05-1422

Supreme Court, U.S.
FILED
AUG 9 - 2006
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In The
Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona

REPLY TO BRIEF IN OPPOSITION

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Petitioner Dillard's, Inc. respectfully submits this Reply to the Brief in Opposition filed by Respondents.[1]

I. THE PRECLUSION ISSUES IN THIS CASE HAVE BEEN PRESERVED FOR THIS COURT'S REVIEW.

The Arizona courts had "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). So long as the state court had an opportunity, "[n]o particular form of words or phrases is essential . . . [a]nd if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The record reflects Dillard's repeated attempts to explain to the Arizona courts the preclusive effect of the judgment obtained in a federal bankruptcy court. And Dillard's cited this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), several times, not only in general discussions of preclusion issues, but also particularly with reference to privity. Resp. App. at 18-19, 21.

More fundamentally, however, neither Respondents nor the Arizona courts could have failed to comprehend that Dillard's was asserting preclusion arising from the judgment of a federal court. Federal common law governs this issue. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Thus, this case does not involve a situation where a party has rights under both federal and state law but raises them in an ambiguous manner. *Compare Webb*, 451 U.S. at 496-97 (reasoning that invocation of "full faith and credit" might refer to Federal Constitution or state statute) *with Bryant*, 278 U.S. at 68-69 (reasoning that because state constitution lacked equal protection clause, invocation of "equal protection" raised federal issue).

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[1] Dillard's incorporates by reference the Corporate Disclosure Statement on page (ii) of its Petition for Writ of Certiorari.

Moreover, even if Dillard's had not adequately raised a federal issue, the issue would be properly before the Court because the Arizona trial court's opinion establishes that it actually considered and decided the issue. "'[I]t is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914)). The Arizona trial court's opinion reflects that it considered Dillard's preclusion arguments, knew that the prior decision issued from a federal bankruptcy court, concluded that preclusion was not applicable, and even recognized that its decision would be erroneous if it had resolved the preclusion question incorrectly. App. to Pet. at 21.

With citations to federal authority and in seven separate briefs, motions, and petitions, Dillard's reminded the Arizona courts that one of the issues before them was the preclusive effect of a federal bankruptcy judgment. The Arizona trial court considered and decided, incorrectly, that issue. On this record, this Court should conclude that a federal claim was "brought to the attention of the state court with fair precision and in due time." *Bryant*, 278 U.S. at 67.

II. RESPONDENTS DO NOT SERIOUSLY DISPUTE THE IMPORTANCE OF THE QUESTIONS PRESENTED.

Respondents have not addressed the arguments of Dillard's regarding the importance of the issue involved in this case: that holding creditors to the results of their trustee's litigation will ensure finality in bankruptcy proceedings, avoid the administrative difficulties that result from the pursuit of duplicative litigation, and reinforce the fundamental bankruptcy policy of equal treatment of creditors. Pet. at 12-16. Instead, Respondents' argument regarding the importance of the issues turns largely on the proposition that the *opinion* below is unimportant because it has been declared unpublished by the Arizona Court of

Appeals. This Court's Rule 10, however, addresses the importance of the question, not the importance of the opinion. In any event, this Court has shown little hesitation to review unpublished decisions in the past. For example, in June 2006 alone, this Court decided three cases arising from unpublished or non-precedential decisions, including one arising from the Arizona Court of Appeals;[2] granted writs of certiorari in two others;[3] and vacated and remanded two other judgments for further consideration.[4]

Respondents also argue briefly that the decision below involved merely a misapplication of a properly stated rule of law. At the same time, they acknowledge that the Arizona Court of Appeals did not even state the relevant rule of law. Br. in Opp. at 15. Indeed, that court did not address preclusion principles at all except to state, inaccurately, that it need not address them. App. to Pet. at 9 n.3.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, THE COURTS OF APPEALS, AND STATE COURTS OF LAST RESORT.

In their efforts to avoid review by this Court, Respondents have distorted the holdings and significance of precedents of this and other courts, in some cases beyond all recognition. Properly analyzed, the cases cited by Dillard's clearly demonstrate a split of authority, as well as

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[2] *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (reviewing unpublished decision of Arizona Court of Appeals); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (reviewing unpublished decision of Supreme Court of Virginia in companion case of *Bustillo v. Johnson*, No. 05-51); *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (reviewing unpublished decision of Michigan Court of Appeals).

[3] *KSR Int'l Co. v. Teleflex, Inc.*, 126 S. Ct. 2965 (2006) (granting certiorari to review non-precedential decision of Federal Circuit); *Burton v. Waddington*, 126 S. Ct. 2352 (2006) (granting certiorari to review unpublished decision of Ninth Circuit).

[4] *Friemann v. United States*, 126 S. Ct. 2859 (2006) (vacating non-precedential decision of Second Circuit); *Bazan v. United States*, 126 S. Ct. 2860 (2006) (vacating unpublished decision of Fifth Circuit).

the divergence of the decision below from this Court's holding in *Heiser v. Woodruff*, 327 U.S. 726 (1946).

Respondents assert that the holding of *Heiser* is that bankruptcy courts must apply the principle of res judicata. Br. in Opp. at 24. To be sure, the Court so concluded, but the case is significant for reasons requiring a more detailed examination of the facts. The unremarkable aspect of *Heiser* is the holding that the bankruptcy trustee, having sought and failed in a federal district court to set aside Heiser's judgment against the debtor, was precluded from objecting to the allowance of the claim in the bankruptcy court. *See Heiser*, 327 U.S. at 736. But the dispute in bankruptcy court also involved two creditors, Willie Mae Woodruff and Ida Belle Woodruff, who were not parties to the effort in district court to set aside Heiser's judgment. *See Woodruff v. Heiser*, 150 F.2d 869, 870 (10th Cir. 1945), *rev'd*, 327 U.S. 726 (1946). By reversing the Tenth Circuit, which would have allowed the trustee and these creditors to attack Heiser's judgment in bankruptcy court, this Court barred both the trustee and the creditors from relitigating issues that the creditors had not previously litigated. *See Heiser*, 327 U.S. at 740 (holding that issue of fraud "may not now be relitigated in the bankruptcy court"). Viewed in this context, the Court's statements that the trustee "represents the bankrupt and his creditors" and that the issue of fraud "was decided against the trustee, the bankrupt and those whom they represent or who claim under them" are far from surplusage, as Respondents suggest; instead, this language expresses the Court's conclusion that creditors are bound by the results of litigation conducted by a trustee for their benefit. *Id.* at 734, 736.

Respondents also argue that there is no split of authority justifying certiorari review of the case below, because the cases cited by Dillard's involve, in effect, creditors' attempts to assert claims on behalf of bankruptcy estates after trustees have done so unsuccessfully or have settled their claims. Br. in Opp. at 25. As a threshold matter, there is no meaningful distinction between a creditor's pursuit of a recovery for its own benefit after a

trustee has unsuccessfully pursued the same recovery for the benefit of that creditor, as in this case, and a creditor's pursuit of a claim on behalf of a bankruptcy estate after a trustee has unsuccessfully pursued that claim for the benefit of the estate. But even if there were such a distinction, a number of the cases cited by Dillard's do not involve the fact pattern posited by Respondents.

For example, in *In re Fortier*, 161 Fed. Appx. 514 (6th Cir. 2005), a creditor who had not previously received notice of a bankruptcy case sought allowance of a priority claim and disgorgement of funds paid to the IRS as part of a settlement with the trustee. In seeking to recover those funds, the priority creditor was not acting for the benefit of the bankruptcy estate; she wanted to receive them for herself. The Sixth Circuit held that the creditor was in privity with the trustee and thus could not upset the IRS settlement "because the trustee acted on behalf of all of [the debtor's] creditors when reaching a settlement with the IRS." *Id.* at 517. Similarly, in *In re Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989), creditors were parties to a proceeding in which the debtor-in-possession sought to sell its assets. Naturally, when the creditors supported the sale, they did so in pursuit of their own interests; the debtor-in-possession represented the estate. After the sale closed, a trustee was appointed and sought to set aside the sale as tainted by fraud. The Seventh Circuit concluded that the trustee could not attack the sale because the creditors he represented had already successfully supported it, and the court had approved it (although the court left open the possibility that the trustee might be able to act on behalf of previously-uninvolved creditors). *Id.* at 1017.

Finally, *In re Medomak Canning*, 922 F.2d 895 (1st Cir. 1990), involved a claim of equitable subordination under 11 U.S.C. § 510(c), which creditors attempted to assert after a trustee settled it. The First Circuit's decision was not based on the premise that the creditors were seeking to act on behalf of the bankruptcy estate, as Respondents suggest. Indeed, the bankruptcy estate would not have benefited in any way from the subordination of

the defendant's claim; the estate would have owned the same assets and would have remained liable to the same creditors in the same amounts. *See* 4 *Collier on Bankruptcy* ¶ 510.02[2] (15th ed. rev. 2006) ("A creditor whose claim has been subordinated does not cease to be a creditor under the Code.") Only certain creditors would have benefited from the subordination of another creditor's claim. The First Circuit concluded that the creditors seeking equitable subordination were bound by the action of the trustee "as their fiduciary and representative to vindicate their interest." *Medomak Canning*, 922 F.2d at 902.[5]

IV. DILLARD'S HAS NOT MADE JUDICIAL ADMISSIONS OR PREVAILED ON ANY ISSUE GIVING RISE TO JUDICIAL ESTOPPEL.

Respondents' argument that Dillard's is bound by purported judicial admissions is easily answered by reference to the cases that they cite. "'Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.'" *Soo Line R.R. Co. v. St. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997) (citation omitted). Respondents have not identified any pleading or stipulation in which Dillard's conceded any matter pertinent here. Instead, Respondents apparently seek to hold Dillard's to a legal position that it purportedly argued below. In another of the cases cited by Respondents, a single member of a three-judge panel reached a conclusion less extraordinary than Respondents', deeming a statement at oral argument to be a judicial admission. *See McCaskill v. SCI Mgt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) (opinion of Bauer, J.). Concurring in the judgment, another judge described this conclusion as "simply stunning" and cited authority demonstrating that counsel's

[5] Respondents also have not even attempted to distinguish the cases cited in footnote 4 on page 9 of the Petition.

statement of a legal theory of a case has never been considered a judicial admission. *Id.* at 681 (Rovner, J., concurring in judgment). The third member of the panel dissented, leaving Judge Bauer without support for his conclusion.

Respondents' papers also include two arguments regarding judicial estoppel, neither of which is persuasive. Judicial estoppel requires that "the party has succeeded in persuading a court to accept that party's earlier position"; otherwise, a change in position "poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *see also Zedner v. United States*, 126 S. Ct. 1976, 1988 (2006) (declining to apply doctrine). Dillard's has had no success in persuading the Arizona courts to adopt its preclusion arguments, regardless of the applicable source of law. Nor did Dillard's convince the Bankruptcy Court in the earlier litigation that the funds at issue belonged to Respondents.[6] Instead, the Bankruptcy Court decided the litigation in favor of Dillard's, and the Ninth Circuit affirmed, on the bases that Dillard's property recouped amounts owed to it from amounts it owed to ETM and that ETM, having earlier repudiated the contract, had no claim for breach of it. App. to Pet. at 23-25.

Moreover, even if the Bankruptcy Court had adopted Dillard's argument regarding property of the estate,

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[6] Dillard's did not argue, as Respondents suggest, that the Trustee could not recover the funds at issue because Dillard's desired all along to pay them to Respondents. Rather, as the materials in Respondents' own appendix make clear, Dillard's argued (1) that the funds were not property of the bankruptcy estate because they had been recouped and applied to ETM's obligations to Dillard's a week before the bankruptcy estate even existed; and alternatively (2) that because ETM served as a conduit or agent for Respondents and others, the estate had only bare legal title to, and not an equitable interest in, the funds at issue, as provided by 11 U.S.C. § 541(d). Resp. App. at 71-78, 82. Stated differently, Dillard's did not argue or acknowledge that Respondents had the right to receive what Dillard's had; the argument was that Respondents had the right to receive whatever the Trustee recovered, which was nothing, as Dillard's consistently maintained.

Dillard's would not be judicially estopped. Judicial estoppel requires that a party's two positions be clearly inconsistent. *New Hampshire*, 532 U.S. at 750; *Zedner*, 126 S. Ct. at 1988. There is nothing inconsistent between Dillard's positions before the Bankruptcy Court and Dillard's positions now, either at an overall level (Dillard's is not liable to the Trustee; Dillard's is not liable to Respondents) or with respect to the particular issue of property of the estate (if the Trustee received money from Dillard's, he would be required to pay it over to Respondents; Respondents are in privity with the Trustee).

V. RESPONDENTS' ARGUMENTS ON THE MERITS ARE UNAVAILING.

Woven throughout Respondents' brief in opposition are several arguments addressing the merits of the underlying dispute. Dillard's is prepared to address the merits in much greater detail should the Petition be granted, but several points call for a brief response here.

First, Respondents argue that they, the Trustee, and Dillard's all had mutually antagonistic interests. Br. in Opp. at 22. To a large degree, this argument is based on the assumption that the Trustee would have distributed any recovery in the Bankruptcy Litigation pro rata to ETM's creditors, rather than turning over to Respondents the portion of the recovery relating to sales of tickets to their events. Br. in Opp. at 18. However, the Trustee alleged that ETM served as a "conduit," a bankruptcy term of art with a significance that could not have been lost on him or his attorneys. Resp. App. at 67; *see also In re Golden Triangle Capital, Inc.*, 171 B.R. 79, 83 (B.A.P. 9th Cir. 1994) ("[T]he funds never became property of the estate since Triangle was only a conduit for the funds; except for its nominal fee, the debtor never had rights in the funds. . . .").[7] Additionally, Respondents undertook

[7] Indeed, Respondents themselves adopt the "conduit" label in their Brief in Opposition. Br. in Opp. at 20.

substantial efforts behind the scenes to support the Trustee's litigation, which would have made little sense unless they expected to benefit from his success. *See* Resp. App. at 25-34; *see also Montana v. United States*, 440 U.S. 147, 154 (1979) ("'[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.'") (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910)).

Second, Respondents claim that the only common issue in the Bankruptcy Court litigation and the Arizona litigation was the interpretation of the contract between Dillard's and ETM. The short response to this argument is that claim preclusion does not require commonality of issues; it depends on a common transaction or series of transactions. *See* Restatement (Second) of Judgments § 24(1) (1982). There is no disagreement that all of the litigation arose out of Dillard's retention of funds otherwise payable to ETM in satisfaction of ETM's obligations to Dillard's, an event that Dillard's claims was proper and Respondents claim was not. But even with respect to issue preclusion, where the focus is on issues actually litigated, the Bankruptcy Court's conclusion that Dillard's properly exercised a right of recoupment is squarely inconsistent with the Arizona Court of Appeals' determination that there was no justification for Dillard's actions. *See* App. to Pet. at 13. Thus, Respondents' bold assertion that the two judgments are "entirely consistent" is entirely inaccurate. Br. in Opp. at 17.

Third, Respondents claim that the preclusive effect of the Bankruptcy Court's judgment is somehow limited, if not nullified, because of that court's jurisdiction. In essence, Respondents argue that because the Bankruptcy Court did not and supposedly could not adjudicate their claim of unjust enrichment, its judgment has no preclusive effect on them. This argument is flawed in several respects. First, it is inconsistent with this Court's precedent. *See Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369 (1996) (holding that state-court judgment may

have preclusive effect on claims within exclusive federal jurisdiction). Second, even assuming that the Bankruptcy Court's jurisdiction were limited to the degree posited by Respondents, its jurisdiction was sufficient to allow it to entertain a claim by the Trustee for unjust enrichment, with the proceeds benefiting Respondents. Finally, the Bankruptcy Court's jurisdiction was broad enough to allow it to entertain an adversary proceeding by Respondents against Dillard's, for every dollar recovered by Respondents would have reduced their claims against the estate and reduced the Trustee's ability to recover from Dillard's, both of which would have affected the bankruptcy estate. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate."). Accordingly, whether Respondents were in privity with the Trustee must be decided for reasons unrelated to bankruptcy jurisdiction.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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